84-6780 (1)

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

WILLIAM ALVIN SMITH,

Petitioner,

-against-

ROBERT O. FRANCIS, WARDEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

STEPHEN H. GLICKMAN
Counsel of Record
Zuckerman, Spaeder, Moore,
Taylor & Kolker
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036
202/775-1440

Counsel for Petitioner

Of Counsel:

STEPHEN B. BRIGHT
600 Healey Building
57 Forsyth Street, N.W.
Atlanta, Georgia 30303
404/688-1202

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QUESTIONS PRESENTED

1. Does the infliction of capital punishment on a mentally retarded offender for an unpremeditated homicide constitute cruel and unusual punishment?

2. Does it violate due process to instruct the jury in a murder trial that the essential element of malice, incorporating the specific intent to kill, "shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart?"

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	21

TABLE OF AUTHORITIES

Cases:	Page
Coker v. Georgia, 433 U.S. 584 (1977)	13, 17
Commonwealth v. Green, 396 Pa. 137, 151 A.2d 214 (1959)	16
Connecticut v. Johnson, 460 U.S. 73 (1983)	20
Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982)	12-15
Fisher v. United States, 328 U.S. 463 (1946)	14
Francis v. Franklin, 53 L.W. 4495 (April 29, 1985)	12,18,19
Gregg v. Georgia, 428 U.S. 153 (1976)	13, 15
Mullaney v. Wilbur, 421 U.S. 684 (1975)	18
Patterson v. New York, 432 U.S. 197 (1977)	18
Patterson v. State, 239 Ga. 409, 238 S.E.2d 2 (1977)	18
Sandstrom v. Montana, 442 U.S. 510 (1979)	18,21
Smith v. Francis, ___ Ga. ___, 325 S.E.2d 362 (1985)	1
Smith v. State, 249 Ga. 228, 290 S.E.2d 43, cert. denied, 459 U.S. 882, reh'g denied, 459 U.S. 1060 (1982)	3,4
State v. Behler, 65 Idaho 464, 14 P.2d 338 (1944)	16
State v. Hall, 126 Neb. 295, 125 N.W. 2d 918 (1964)	16
Woods v. State, 214 Ga. 546, 105 S.E.2d 896 (1958)	16

Page

Constitutional and Statutory Provisions:

U.S. Const. Amend. VIII 2, 11
Amend. XIV 2

28 U.S.C. § 1257(3)..... 1

Ga. Code Ann. § 26-1101(a)(1978) 2, 18
§ 50-127(7) (1978) 8

Rules of the Supreme Court of the United States

Rule 17.1(c) 12

Miscellaneous

Bromberg, The Mold of Murder (1961)..... 16

Glueck, Mental Disorder and the Law (1925)..... 17

Grigg, Criminal Behavior of Mentally Retarded Adults, 52 Am. J of Mental Deficiency 370(1948) 16

Sternlicht and Deutsch, Personality Development and Social Behavior in the Mentally Retarded (1972)..... 15, 17

Tredgold and Soddy, Textbook of Mental Deficiency (10th ed. 1963)..... 17

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OPINIONS BELOW

The opinion of the Supreme Court of Georgia, reported at 325 S.E.2d 362 (1985), is reproduced at Appendix A. The unreported opinion and order of the Superior Court of Butts County, Georgia is reproduced at Appendix B.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on January 29, 1985. Rehearing was denied on February 19, 1985. The notification to counsel that rehearing was denied is reproduced at Appendix C. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law....

The Georgia malice murder statute in effect at the time of petitioner's trial, Ga. Ann. Code §26-1101(a)(1978), provided in relevant part:

> A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being....Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

STATEMENT OF THE CASE

A. Procedural History

On September 14 and 15, 1981, in the Superior Court of Oglethorpe County, Georgia, petitioner William Alvin Smith was tried on charges of malice murder and armed robbery. He was convicted and sentenced to death. On direct appeal the Supreme Court of Georgia affirmed his convictions and sentence in a decision rendered April 6, 1982. Smith v. State, 249 Ga. 228, 290 S.E.2d 43 (1982). This Court denied certiorari.[1/] Smith v. Georgia, 459 U.S. 882, rehearing denied, 459 U.S. 1060 (1982).

Petitioner then filed his petition for a writ of habeas corpus in the Superior Court of Butts County (Flint Judicial Circuit), Georgia. An evidentiary hearing on this petition was held on March 31, 1983, and the court denied habeas corpus relief on April 19, 1984. The Supreme Court of Georgia affirmed in an opinion dated January 29, 1985, and denied rehearing on February 19, 1985.

B. The Trial

At petitioner's trial, the State presented evidence that on June 8, 1981, petitioner assaulted one Dan Turner with a knife

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1/ The questions presented in petitioner's certiorari petitions filed in this Court in 1982 were not the same as those presented now.

and a hammer in the latter's grocery store, and then stole money from the cash register and Turner's wallet. Turner died later that day, the result of blunt force trauma to the head. See Smith v. State, 290 S.E.2d at 47-48.

Petitioner called two witnesses who testified during the guilt-innocence phase of his trial about his mental retardation.[2/] The first witness, Merrill L. Gay, had been the assistant principal of petitioner's middle school. He testified that petitioner had been placed in the "educable mentally retarded class, meaning slow learner," on the basis of his I.Q. score. (T.T. 273.[3/]) The second witness was Dr. Everett Clark Kuglar, the Superintendent of the Georgia Regional Hospital, and the psychiatrist who had evaluated petitioner pursuant to court order. Dr. Kuglar testified that petitioner was mentally retarded with a full scale I.Q. score of 65 and a mental age of somewhere between ten and eleven years. (T.T. 280-281.) "That is, that the logic, the calculation abilities, planning abilities, the ability to perceive things is roughly that of a youngster in the 10 to 11 year age range." (T.T. 281.) Dr. Kuglar's testimony is reproduced in Appendix D.

Petitioner himself also testified during the guilt-innocence phase of the trial. (T.T. 285-298.) He described his offense as,

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2/ These witnesses testified in connection with an attempted insanity defense.

3/ "T.T." refers to the trial transcript.

in effect, an impulsive act of violence that escalated out of control[4], and testified that he "didn't mean to kill Mr. Dan"[5]. Petitioner's testimony is reproduced in full in Appendix E.

4/ Petitioner's testimony was as follows:

Q. Okay. Now, when you got to Mr. Dan's place, tell the ladies and gentlemen of the jury what happened.

A. Well, I went in there like I always do. I got in the store and he was laying up...You know, sometimes he'd be asleep in the chair, like he always do. And he woke up and he looked at me and he didn't speak to me like he usually do. I asked him for a pack of cigarettes, and he said, "What kind?" I said, "Winstons." So he went to get the cigarettes and, when he retched at the cigarettes, I retched at him and...

Q. Wait a minute. You retched (sic) at him?

A. Yes.

Q. What do you mean by that?

A. You know, when he retched at the cigarettes, I retched at him, you know, just ...Then he, you know, had the hammer and, when he grabbed that hammer, you know, he started forcing his self, you know, and I got carried way.

Q. You got carried away? What did you do?

A. All I know, I was stabbing. That's all. He said something to me, but I don't know what he said.

Q. And then what did you do?

A. Well, he started back to the back and then he fell, and when he fell, the hammer, it fell, too, and I guess I picked the hammer up and hit him with it.)

(T.T. 287; see also T.T. 291-296.)

5/ Petitioner's testimony was as follows:

Q. Do you have any other statements you want to say to the jury?

A. Yes. I didn't mean to kill Mr. Dan and I ain't had nothing against Mr. Dan or nothing, and I'm sorry I did it. I didn't go and tell the Sheriff that. I told myself that when

[Footnote continued next page]

In closing argument after the guilt-innocence phase of the trial, petitioner's counsel argued that petitioner "was so mentally impaired that he did not have the requisite mental intent." (T.T. 316-317.) Based on petitioner's level of retardation and the "absolutely bizarre, totally senseless" nature of the offense (T.T. 314), counsel also sought a verdict of not guilty by reason of insanity.

Petitioner's intent was thus a central issue in the trial. On the question of intent, the court first charged the jury that "a person will not be presumed to act with criminal intention, but you, the jury, may find such intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act or acts for which the accused in this case

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5/ [Footnote Continued]

> I was in the bushes, when I run. I stopped and thought about it and I cried, you know, because it hurt me because Mr. Dan been knowing me and my folks as long as I can remember. And he ain't never said nothing smart or, you know, nothing to us or nothing. He always have been good to me. I can say that. And I have went in there when he was out of the store and waited I don't know how many minutes for him to come back. When he come back, he always, you know, looked at me and ... I remember being there two or three days before this you know, and he was on the outside by the drink machine. And there was some birds and stuff out in the yard, you know, and you know, me and him sat out there and laughed at it for a while. And he asked me about my aunt Florene, the one that stays in Atlanta. Most every time I go up there, he always asks me about my aunt. He knowed my aunt and mama and them when they was little, you know. They used to come in the store. I never intended to kill him. I didn't even intend to touch him. That's all I've got to say.

(T.T. 290.)

is prosecuted." (T.T. 330.) Subsequently, however, the court charged that the essential element of malice, incorporating the specific intent to kill, "shall be implied" from certain circumstances:

> [A] person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate, intentional, unlawfully [sic] to take away the life of a fellow creature which is manifest by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.... Express malice is that of [sic] deliberate intention to take away the life of a fellow creature. Malice would be implied where no considerable provocation appears and all the circumstances of the killing show an abandoned and malignant heart.

(T.T. 335-336; emphasis added.) The court then went on to instruct the jury that premeditation was not required. (T.T. 336.) (The trial court's charge at the conclusion of the guilt-innocence phase of the trial is reproduced in its entirety at Appendix F.)

Following the jury's verdicts of guilty on both counts, a brief sentencing proceeding was held. Petitioner's counsel sought mercy partly on the basis of petitioner's retardation. (T.T. 366-369.) In response to this point, the prosecuting attorney reminded the jury that petitioner had been found "criminally responsible for his act" (a reference to the jury's rejection of petitioner's insanity claim). (T.T. 374.) The trial court's sentencing instructions did not address the significance, if any, of petitioner's mental retardation.

The jury imposed the death penalty.

C. The Appeal

The Georgia Supreme Court affirmed the convictions and death sentence on appeal. In holding the evidence inadequate to support the attempted insanity defense, that Court acknowledged petitioner's retardation. In reviewing the appropriateness of petitioner's sentence, however, the Court did not discuss the possible significance of his mental handicaps.

The Court also did not address the trial court's jury instructions regarding malice and intent to kill.

D. The State Habeas Proceedings

In his petition for a writ of habeas corpus, petitioner challenged his convictions and death sentence on a number of federal constitutional grounds including (1) that he was denied due process by the establishment of a conclusive presumption on the essential element of malice (¶¶ 62-63); and (2) that in light of his mental retardation, the death penalty constituted cruel and unusual punishment (¶¶ 86-89). (The pertinent excerpts from the habeas corpus petition are reproduced in Appendix G.)

At the March 31, 1983, habeas corpus hearing, petitioner introduced the affidavits of twenty-nine witnesses, both lay and expert.[6/] Many of these witnesses described petitioner's mental

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6/ The introduction of evidence by affidavit at a habeas corpus hearing was expressly permitted by Ga. Code Ann. § 50-127(7) (1978).

limitations (which respondent did not contest). The most detailed discussion was contained in the affidavit of Brad Fisher, Ph.D., an experienced clinical and correctional psychologist who had clinically evaluated petitioner for the hearing. (His affidavit is reproduced in Appendix H.)

The evidence at the hearing fully confirmed Dr. Kuglar's trial testimony that petitioner had a mental age of between ten and eleven years. With a full-scale I.Q. of 65, he fell within the bottom 2.2% of the population. (Fisher Affidavit at 17.) Dr. Fisher elaborated on the serious functional consequences of petitioner's mental defects as follows:

> The presence of this level of mental retardation indicates much more than just slow learning; it indicates impaired social judgment, impaired ability to understand or acknowledge the consequences of behavior, impaired ability to make rational judgments, increased dependency features, susceptibility to confusion and anxiety in stressful situations, tendency toward more impulsive behavior (this often based on the condition in which the retarded person has more frequent frustrations with the many situations that are confusing and complex to him or her, without the ability to appropriately vent that frustration) and some diminished capacity to distinguish between right and wrong. This latter category is different from an inability to distinguish between right and wrong that may be the case where the insanity issue is involved. [7/]

7/ The lay witness affidavits corroborated this description. They variously described petitioner as being slow, severely limited and childlike.

(Fisher Affidavit at 11; see also pages 8, 13-14, 16.) Dr. Fisher related these features of petitioner's personality to his offense.[8/]

8/ Dr. Fisher discussed petitioner's offense as follows:

> [T]he following features seem especially noteworthy in his description of situational components in the days surrounding the commission of the crime. First, it should be pointed out that one of the most important people in William's life at this time was his girlfriend. He described her as the first person near his own age who had really cared about him, and this had taken on extraordinary importance in his life. With this in mind, the fact that he had broken up with his girlfriend in the two days previous to the crime appears significant. His own description of this event included his feelings of total frustration and confusion over what to do about the breakup.
>
> A second factor revolves around the destruction of William's car the day before the crime. This automobile was his first material possession of consequence, and a major feature relating to his self-esteem and feelings of self-worth. It should be noted that at the time the car was destroyed he did not have a license, and the car was not paid for. This served to further heighten his level of frustration and resultant confusion because of his inability to deal with that frustration....
>
> If one was to rank the two most important things in William Smith's life, these would probably have been his girlfriend and his car. To have both of these taken away at the same time would have been traumatic for anyone; however, with his primary psychological dynamics including major limitations in his ability to deal with frustration, as well as easily formed frustration and confusion over typical life experiences not confusing to those not mentally retarded, these events take on special significance. For a person with William's level of retardation, it is important to have a simple, straightforward, and consistent foundation upon which to operate. In his case, the two critical ingredients of this somewhat shaky foundation had been removed, which brought into play the limitations connected with his retardation, much more than would have been the case for a person with normal intellectual functioning, frustration tolerance, and ability to not become confused by outside stimuli.

(Fisher Affidavit, pages 8-10.)

The evidence concerning petitioner's retardation and its relation to his offenses was not disputed. The uncontradicted portrait that emerged was of a mentally impaired young man whose retardation had profound behavioral consequences. His offenses were fairly characterized as a tragically impulsive outburst in response to inner turmoil, frustration and confusion beyond his impaired ability to resolve or control.

The habeas court rendered its decision denying relief on April 19, 1984, more than a year after the hearing. The court upheld the malice charge, stating that "the trial court appears to have been very careful to convey to the jury that the State was required to prove each individual element of each crime beyond a reasonable doubt." (Appendix B, page 25.)

The court also rejected petitioner's cruel and unusual punishment claim, predicated on his mental retardation, on the ground that "[t]he [Georgia] Supreme Court has already concluded that Petitioner's death sentence is not excessive or disproportionate." (Appendix B, page 29.)

The Georgia Supreme Court affirmed the habeas court's treatment of these particular claims without further discussion. (Appendix A, page 7.)

REASONS FOR GRANTING THE WRIT

Imposing the death penalty on mentally retarded offenders implicates fundamental principles of Eighth Amendment jurisprudence.

In rejecting petitioner's cruel and unusual punishment claim, the Georgia state courts have decided an important question of federal law which has not been, but which should be, settled by this Court. We discuss this question in Part A, infra.

Instructions in a murder trial that require the jury to "imply" the essential element of malice raise basic due process concerns that this Court has repeatedly addressed, most recently in Francis v. Franklin, 53 L.W. 4495 (April 29, 1985). In upholding those instructions in this case, the Georgia courts have deviated from the principles articulated in Franklin and other applicable decisions of this Court. We examine this issue in Part B, infra.

Certiorari should therefore be granted to resolve both questions presented by this petition, pursuant to Rule 17.1(c) of this Court's Rules.

A. Infliction of Capital Punishment on a Mentally Retarded Offender for an Unpremeditated Homicide Violates Basic Principles of Death Penalty Jurisprudence.

The question in this case is whether the Constitution tolerates imposing the most merciless and irrevocable of punishments on people who, from inherent mental defect, are least able to understand and obey society's strictures.

This Court most recently held a death sentence cruel and unusual in Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368, 73 L.Ed 2d 1140 (1982). There the Court held that the death penalty

could not constitutionally be imposed on one who aided and abetted a robbery during which murder was committed by others, if he did not himself kill or intend to kill. Enmund's analysis of the cruel and unusual punishment clause in those circumstances establishes the controlling principles here.

To begin with, the issue is not whether death is a disproportionate penalty for murder, but rather whether it is a valid penalt for the particular offender. 102 S.Ct. at 3378, 73 L.Ed 2d at 1152. "The focus must be on his culpability, ... for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' ... which means that we must focus on 'relevant facets of the character and record of the individual offender.'" Id. (citations omitted; emphasis in the original).

Death is a disproportionate punishment for the particular offender in question if the legitimate purposes of capital punishment would not be substantially fostered by its infliction on persons like him. The two legitimate purposes of the death penalty are deterrence of capital crimes by prospective offenders, and retribution. Gregg v. Georgia, 428 U.S. 153, 183 (1976). "Unless the death penalty when applied to those in [the defendant's] position measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." Enmund, 102 S.Ct. at 3377, 73 L.Ed.2d at 1152, quoting Coker v. Georgia, 433 U.S. 584, 592 (1977).

The Court struck down the death penalty in Enmund because neither deterrence nor retribution would have been significantly furthered by its infliction. Regarding deterrence, the Court considered the effect on those similarly situated to Enmund and declared itself "quite unconvinced" that the possibility of capital punishment for vicarious felony murder would deter those who do not contemplate the killing. 102 S.Ct. at 3377, 73 L.Ed. 2d at 1152-1153. The Court quoted with approval Justice Frankfurter's observation in Fisher v. United States, 328 U.S. 463, 484 (1946), that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation." Id.

The Court also dismissed the notion that retribution could justify Enmund's execution. Retribution, the Court held, must be tailored to the defendant's "personal responsibility and moral guilt." Id., 102 S.Ct. at 3378, 73 L.Ed.2d at 1154. The defendant's mental state is critical to this assessment. Id. Absent the intention to kill, the defendant's culpability would not be so great that his execution would "measurably contribute to the retributive end of insuring that the criminal gets his just desserts." Id.

The application of the foregoing principles to this case requires that petitioner's relevant personal characteristics be identified and described. As in Enmund, the focus must be on petitioner's mental condition and its relation to his offense. Then it is necessary to weigh the efficacy of capital punishment for people like petitioner in achieving the goals of retribution and deterrence.

Petitioner's outstanding characteristic is his unquestioned mental retardation. He functions at the level of a ten to eleven year-old child. He manifests not merely reduced intellectual capacity, but also impaired judgment, limited ability to understand or acknowledge the consequences of his behavior, susceptibility to confusion and anxiety under stress and a tendency toward impulsive behavior and inappropriate responses to frustration. These characteristics were intimately related to his impulsive act of violence in this case.

Application of the death penalty to retardates like petitioner for unpremeditated murder measurably serves neither deterrence nor retribution. As far as deterrence is concerned, retardates' impulsivity and intellectual impairment virtually rule out the kind of fully contemplated crime for which the threat of the death penalty can realistically have a deterrent effect. Cf. Enmund, 102 S.Ct. at 3377-3378, 73 L.Ed 2d at 1152-1153.[9/] Moreover, the retardate's diminished ability to project into the future and rationally contemplate the consequences of his acts further reduces the likelihood that he will appreciate and be restrained by the prospect of punishment, or that he will be influenced by variations in the degree of punishment. See Sternlicht and Deutsch, Personality Development and Social Behavior in the Mentally Retarded

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9/ See also Gregg v. Georgia, 428 U.S. at 185-186, distinguishing "murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect," from those who perpetrate "carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act."

80 (1972); Grigg, Criminal Behavior of Mentally Retarded Adults, 52 Am. J. of Mental Deficiency 370, 371, 374 (1948).

Retribution is an even poorer justification for executing retardates such as petitioner, depending as it does on the degree of their personal culpability. Courts have long recognized in capital cases that the mentally retarded are not to be held to normal standards of accountability. E.g., State v. Hall, 126 Neb. 295, 310, 125 N.W.2d 918, 927 (1964) (reducing death sentence to life imprisonment where defendant had an I.Q. of 64); State v. Behler, 65 Idaho 464, 475-476, 146 P.2d 338, 343 (1944) (sentence of death reduced to life imprisonment because defendant "possesses a very low order of intelligence"); Commonwealth v. Green, 396 Pa. 137, 148, 151 A.2d 241, 247-248 (1959) (death penalty vacated in light of defendant's youth and dull normal intelligence); see also Woods v. State, 241 Ga. 546, 105 S.E.2d 896, 897 (1958) (jury instructed that weakmindedness, though no defense to the crime, may be grounds for recommendation of mercy). In virtually every state with a capital sentencing scheme, mental retardation is recognized to be a mitigating factor in sentencing.

The complex of reasons why retardates are inherently less responsible than ordinary people for their antisocial behavior is summarized in Dr. Fisher's affidavit. His description of the mentally retarded person's handicaps and impaired impulse control is strongly supported in the literature. On the retardate's special proneness to act immediately and violently to the urges of the

moment, see, e.g., Bromberg, The Mold of Murder 202 (1961) (tendency of retardates to "react in a blinding flash of vengeance" against frustration and humiliation); Glueck, Mental Disorder and the Law 334-335 (1925) (retardate's defective control of instinctive behavior may lead to serious crimes of violence); Sternlicht and Deutsch, supra at 58 (failure of defense mechanisms of repression and inhibition impair retardates' ability to control aggressive and hostile impulses). As the last-named authors state,

> [The] retarded individual is especially prone to committing deviant acts because he will be subject to weak and ineffective functioning not only in the realm of conscience and values but in the realm of judgment and common sense as well. It is the latter deficit, in fact, which creates perhaps the more immediate and pervasive of the retardate's problems in the area of deviant and antisocial conduct.

Id., at 81. See also Tredgold and Soddy, Textbook of Mental Deficiency 252 (10th ed. 1963) (retardate may evince an understanding of the "nature" of the act -- that it is forbidden -- without fully understanding its "quality").

In short, the infliction of the death penalty on mentally retarded offenders such as petitioner does not serve either of the two recognized purposes of capital punishment. It is therefore "nothing more than the purposeless and needless imposition of pain and suffering," Coker v. Georgia, 433 U.S. at 592, which the Eighth and Fourteenth Amendments forbid.

B. The Jury Instructions Regarding Malice and Intent Did Not Comport with Due Process of Law

In Francis v. Franklin, supra, this Court recently reiterated that due process "prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." 53 L.W. at 4497. A mandatory presumption, whether conclusive or rebuttable, of one essential element upon proof of other elements is therefore unconstitutional. Id. See also Sandstrom v. Montana, 442 U.S. 510, 520-524 (1979); Patterson v. New York, 432 U.S. 197, 215 (1977); Mullaney v. Wilbur 421 U.S. 684, 698-701 (1975).

Malice, incorporating an intent to kill[10/] (as well as an absence of provocation), was an essential element of the offense of murder with which petitioner was charged. Ga. Code Ann. § 26-1101 (1978). The court instructed petitioner's jury, however, that there were two forms of the essential element of malice, "express" and "implied." While express malice meant that the homicide was "deliberate" and "intentional," petitioner's jury was not required to find such malice. Instead the trial court instructed that "[m]alice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart." (T.T. at 336; emphasis added.) Petitioner's

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10/ Intent to kill is an element of the offense of malice murder in Georgia. See Patterson v. State, 239 Ga. 409, 416-417, 238 S.E.2d 2, 8 (1977).

jury could quite reasonably have understood this instruction unconstitutionally to signify either that no finding of the requisite intent to kill was required at all, or that such intent was conclusively presumed, where the circumstances of the killing were sufficiently aggravated.

The state habeas court found no due process violation in the context of the overall charge because "the trial court appears to have been very careful to convey to the jury that the State was required to prove each individual element of each crime beyond a reasonable doubt. (T.T. 326, 327, 330, 339)." The habeas court concluded that therefore no reasonable juror "would infer a burden on Petitioner to prove a lack of malice given the trial court's instructions as a whole." (Appendix B at page 25.) But this reasoning does not withstand analysis in light of this Court's recent opinion in Franklin.

There this Court emphasized that "general instructions on the State's burden of persuasion and the defendant's presumption of innocence are not 'rhetorically inconsistent with a conclusive or burden-shifting presumption,' because '[t]he jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied.'" 53 L.W. at 4499.

Nor was the jury charge in petitioner's case saved by the instruction that "a person will not be presumed to act with criminal intention, but you, the jury, may find such intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act or acts for which the accused

in this case is prosecuted." This Court held the very same instruction to be a wholly inadequate corrective in Franklin, 53 L.W. at 4499-4500.

This Court has not resolved whether an unconstitutional burden-shifting charge can ever be harmless. See Connecticut v. Johnson, 460 U.S. 73 (1983). It was not clearly harmless in petitioner's case, however, because his trial testimony, if credited by the jury, would have justified it in retaining a reasonable doubt about his intent.

Petitioner testified that he "didn't mean to kill Mr. Dan." (T.T. 290.) His counsel argued lack of intent to the jury in his summation. (T.T. 309, 316-317.) Petitioner's version of his offense was that he entered Turner's store, asked for cigarettes, and impulsively grabbed Turner when Turner started to get them.[11/] (T.T. 287.) According to petitioner, Turner then "had the hammer and, when he grabbed that hammer, you know, he started forcing his self, you know, and I got carried away." (T.T. 287.) Only after Turner displayed the hammer "and he was forcing me" (T.T. at 291), petitioner said, did he pull out his knife and stab Turner. (T.T. 292.) When Turner fell and dropped the hammer, petitioner, still "carried away," picked it up and hit Turner with it. (T.T. 287.) This happened after petitioner's knife had broken and cut petitioner's own hand. (T.T. 294.) Petitioner's protestation that he did not intend to kill Turner was rendered substantially more credible by the evidence that he was mentally retarded.

11/ Petitioner steadfastly denied that he was attempting to rob Turner. (T.T. 288,292, 296-297.)

Petitioner's testimony, if credited by the jury, would have justified it in finding an absence of malice because petitioner did not have the deliberate intention to kill. But if the jury followed the trial court's instruction, it may have taken the easy way out and implied malice without undertaking "the more difficult task" of evaluating the evidence on intent. Sandstrom v. Montana, 442 U.S. at 526 n. 13. Because this possibility cannot be ruled out, the due process error cannot be deemed harmless, and petitioner's conviction of malice murder cannot stand.

CONCLUSION

For the reasons stated, this Court should issue the requested writ of certiorari.

Respectfully submitted,

STEPHEN H. GLICKMAN
Counsel of Record
Zuckerman, Spaeder, Moore,
Taylor & Kolker
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036
202/775-1440

Of Counsel:

Stephen B. Bright
600 Healey Building
57 Forsyth Street, N.W.
Atlanta, Georgia 30303
404/688-1202

In the Supreme Court of Georgia

Decided: JAN 29 1985

41276, 41504. SMITH v. FRANCIS, Warden.

HILL, Chief Justice.

William Alvin Smith was convicted of the murder and armed robbery of Daniel Turner and sentenced to death. Smith v. State, 249 Ga. 228 (290 SE2d 43) (1982), cert. denied, 103 SC 182 (1982). This is his appeal from the denial of habeas corpus.

In his original petition ior habeas corpus, Smith raised 14 grounds. Following a hearing, the habeas court issued a lengthy order finding the applicable facts and deciding each point raised. Smith then filed an application for a certificate of probable cause to appeal, raising 14 enumerations of error. This court granted the application to appeal, which brings the entire case before this court.[1]

1. In granting this application, the court was particularly interested in Smith's numerous allegations that he had been denied effective assistance of counsel. Having reviewed the transcript of the original trial as well as that of the hearing in this habeas case, we have concluded that those allegations are unfounded.

In Strickland v. Washington, U. S. (104 SC 2052, 80 LE2d 674) (1984), the Supreme Court set forth the standards for judging a defendant's contention that the Sixth Amendment requires a conviction or death sentence to be set aside because of actual ineffective assistance of counsel at trial or sentencing.[2] The standards adopted apply to trials of criminal cases and to death penalty sentencing proceedings, but not to sentencing in other criminal cases. The Court set forth a two step test, saying

(104 SC at 2064): "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." The Court emphasized that the burden is on the defendant to make both showings, and that a reviewing court could find lack of sufficient prejudice without deciding whether counsel's performance was deficient (104 SC at 2069-70).

Concerning counsel's performance, the Court noted that all federal courts of appeal and most state courts have adopted the "reasonably effective assistance" standard, as Georgia has,[3] and approved it (104 SC at 2064). The Court went on to note that the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances, and stated that every effort must be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time (104 SC at 1065). The Court also pointed out that a reviewing court should recognize that counsel is entitled to a "strong presumption" (which the defendant must overcome) that counsel's conduct falls within the wide range of reasonable professional conduct and that all significant decisions were made in the exercise of reasonable professional judgment (104 SC at 2066).

Concerning the prejudice component, the Court held that the defendant must show that there is a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different (104 SC at 2068). Regarding death penalties, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did

not warrant death (104 SC at 2069).

Applying the foregoing standards we find that Smith has failed to show that he was not provided reasonably effective assistance of counsel considering all the circumstances.[4] We find further that Smith has failed to show that there is a reasonable probability sufficient to undermine confidence in the outcome that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, supra.

In reaching these conclusions we have undertaken to evaluate counsel's conduct from his perspective at the time of trial. For example, the defendant elected to plead not guilty to the charges of murder and armed robbery, and it was counsel's duty to provide assistance to him in the guilt-innocence as well as the sentencing phase of the trial. Defendant is now critical of his counsel for, inter alia, having asserted an unfounded defense of insanity, but faced with a not guilty plea, a confession and a witness who arrived during commission of the crimes who knew (and hence could positively identify) the defendant, Smith v. State, supra, 249 Ga. at 233-234, counsel's choice of the insanity defense (as opposed to alibi, self defense, coercion, etc.) was reasonable under the circumstances.

The habeas court did not err in denying relief upon this ground.

2. At oral argument in this court, Smith's attorneys focused their attention on his contention that in instructing the jury during the sentencing phase the trial court erred by failing to explain what mitigating circumstances are, and their function in the jury's deliberations.

At defendant's trial, the court commenced the sentencing phase by informing the jury as follows:

"Now, ladies and gentlemen of the jury, the defendant in this case, William Alvin Smith, has been found guilty of the offense of murder and it now becomes your duty to determine,

within the limits prescribed by law, what penalty shall be imposed for this offense. The Court will impose the penalty for the armed robery and you will impose the penalty for the offense of murder.

"The law provides that when a person is found guilty in such a case, in which the State is demanding the death penalty and in which the death penalty may be imposed, it is the duty of the presiding Judge to hold a second phase of the trial and to offer the State an opportunity to present evidence in aggravation of the punishment and the accused an opportunity to present evidence in extenuation and in mitigation of punishment. We are now in that phase of the trial. . . ."

After the introduction of evidence during the sentencing phase and after argument of counsel, the court instructed the jury in pertinent part as follows:

"Now, ladies and gentlemen of the jury, you should consider all of the evidence, both the evidence submitted during the sentence phase, as well as the evidence submitted at the prior phase of this trial, in arriving at your verdict as to the sentence to be imposed. This includes any evidence of mitigating circumstances received by you in this case.

"Ladies and gentlemen of the jury, even if you find beyond a reasonable doubt that the state has proved the existence of aggravating circumstances in this case which would justify under the law the imposition of a death sentence, you are not required to recommend that the accused be put to death. You would be authorized under these circumstances to recommend the death penalty, but you are not required to do so. The sentence to be imposed in this case is a matter entirely within your discretion and you may provide for a life sentence for this accused for any reason that is satisfactory to you or without any reason if you care to do so. The law vests the exclusive right with the

jury to either make or withhold a recommendation for the death penalty."[5]

Smith contends that this charge does not meet the requirements set out in Spivey v. Zant, 661 F2d 464, 471 (5th Cir. Unit B 1981), cert. denied, 102 SC 3495 (1982), and its progeny.[6] In Spivey the court found that in death penalty cases the jury must receive clear instructions which not only do not preclude consideration of mitigating factors, but which also guide and focus the jury's objective consideration of the particularized circumstances of the individual offense and the offender. The court went on to say (661 F2d at 471): "In most cases, this will mean that the judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death; in order to do so, the judge will normally tell the jury what a mitigating circumstance is and what its function is in the jury's sentencing deliberations."

In Spivey, the court's sentencing instructions did not use the word "mitigation" and, hence, did not inform the jury that it should consider evidence of mitigating circumstances. Moreover, the court did not inform the jury that even if it found the existence of aggravating circumstances, the jury could decide not to impose the death penalty. Thus, the instructions in the case before us are not the same as in Spivey.

More importantly, as the United States Supreme Court noted in Zant v. Stephens, U. S. (103 SC , 77 LE2d 235, 247-248) (1983): "In Georgia, unlike some other States, the jury is not instructed to . . . balance aggravating against mitigating circumstances pursuant to any special standard." The Court went on to observe: "Georgia's scheme includes two important features which the plurality [in Gregg v. Georgia, 428 U. S. 153 (96 SC 2909, 49 LE2d 859) (1976)] described in its general discussion of sentencing procedures that would guide and channel the

exercise of discretion. Georgia has a bifurcated procedure, see id., at 190-191, 49 LE2d 859, 96 SC 2909, and its statute also mandates meaningful appellate review of every death sentence, see id., at 195, 49 LE2d 859, 96 SC 2909. The statute does not, however, follow the Model Penal Code's recommendation that the jury's discretion in weighing aggravating and mitigating circumstances against each other should be governed by specific standards."

Rejecting Stephens' argument because it would necessitate overruling Gregg v. Georgia, the Court said (77 LE2d at 249): "For the Court approved Georgia's capital sentencing statute even though it clearly did not channel the jury's discretion by enunciating specific standards to guide the jury's consideration of aggravating and mitigating circumstances." The Court concluded, saying (77 LE2d at 258) that ". . . the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances, and Georgia has not adopted such a system."

Although the Stephens opinion involved a different issue and hence is not authority for our holding here, we find it persuasive that the U. S. Supreme Court does not require that a jury in Georgia be instructed as to specific standards for weighing aggravating and mitigating circumstances (i.e., the jury need not be instructed as to the function of mitigating circumstances), so long as the jury is allowed and instructed to consider any evidence in mitigation and is instructed, as here, that it has the discretion, notwithstanding proof of aggravating circumstances, to sentence the defendant to life in prison for any reason satisfactory to the jury or without any reason.[7]

As the U. S. Supreme Court noted in Zant v. Stephens, supra, Georgia, unlike some other states, does not require juries to balance aggravating against mitigating circumstances pursuant to any standard. In Georgia, juries may

withhold the death penalty for any reason, or without any reason, and the jury was so instructed here.[8] Hence, the need for instruction as to the nature and function of mitigating circumstances is greatly diminished in Georgia. For these reasons, we do not find the charge in issue here to have been erroneous. Smith v. State, supra; Cape v. State, 246 Ga. 520 (9) (272 SE2d 487) (1980).

3. The order entered by the habeas court discusses each of the remaining issues raised by Smith. We affirm the conclusion of that court that none of them merit relief.

Judgment affirmed. All the Justices concur.

ENDNOTES

[1] After Smith's first application to appeal was granted, the habeas court entered an order overruling Smith's motion to amend his original petition to add an additional ground. Smith's application for a certificate of probable cause as to that order was granted and that appeal was consolidated with his earlier appeal. The issue Smith belatedly sought to raise--that it was error for the trial court not to instruct the jury during the sentencing phase that it could specify that any life sentences imposed be served consecutively--has been decided adversely to him. Ingram v. State, Ga. (16) (Case No. 41100, decided November 27, 1984); Spivey v. State, 253 Ga. 187 (5) (319 SE2d 420) (1984).

[2] "Actual" ineffective assistance of counsel excludes cases involving actual or constructive denial of the assistance of counsel altogether, and state interference with the ability of counsel to render effective assistance. The Court also excluded cases involving assistance of counsel rendered ineffective by a conflict of interest. 104 SC at 2062.

[3] Pitts v. Glass, 231 Ga. 638 (203 SE2d 515) (1974).

[4] Because the habeas court has written a lengthy order treating alleged instances of ineffectiveness in detail, we find it unnecesary to repeat all the facts and contentions here. We do note, however, that contrary to a statement in the order, no witnesses as to Smith's "mental level" were presented during the sentencing phase.

[5] Other instructions by the court made it clear to the jury that it could not impose the death penalty unless it found the existence of a statutory aggravating circumstance beyond a reasonable doubt.

[6] Westbrook v. Zant, 704 F2d 1487 (11th Cir. 1983); Finney v. Zant, 709 F2d 643 (11th Cir. 1983); Morgan v. Zant, 743 F2d 775 (11th Cir. 1984).

[7] Compare Morgan v. Zant, supra (fn 6), 743 F2d at 779).

[8] As Justice Stewart, writing the plurality opinion in Gregg v. Georgia, 428 U. S. 153, 199 (96 SC 2909, 49 LE2d 859) (1976), said: "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." See also Connor v. State, 251 Ga. 113, 119 (303 SE2d 266) (1983).

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

WILLIAM ALVIN SMITH,	:	
	:	
PETITIONER	:	
	:	HABEAS CORPUS
VS.	:	CASE NO. 5804
	:	
ROBERT O. FRANCIS, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

O R D E R

This habeas corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Oglethorpe County. Petitioner was convicted of armed robbery and murder. He was sentenced to life imprisonment for the armed robbery and to death for the murder which the jury found to be outrageously and wantonly vile, horrible and inhuman in that the murder involved torture, depravity of mind and aggravated battery to the victim.

Petitioner's convictions and sentences were affirmed on direct appeal. Smith v. State, 249 Ga. 228 (1982). The United States Supreme Court denied certiorari. Smith v. Georgia, ___ U.S. ___, 74 L.Ed 2d 148 (1982). A petition for rehearing was also denied on November 29, 1982. Petitioner now comes before this Court on his first state habeas corpus petition.

The petition contains 106 numbered paragraphs, of which 86 allege substantive claims for relief (20 - 105). These will be addressed numerically corresponding to major topical areas and by related allegations within the broader category.

Filed April 16 1984 at 2:30 P.M.
Donald P. Rahauser
Clerk, Butts Superior Court

The record in this case consists of the transcript of proceedings before this Court on March 31, 1983, and the record and transcript of Petitioner's trial in Oglethorpe Superior Court.

20-43

In paragraphs 20-43, Petitioner alleges that the attorney, Floyd Keeble, who represented him at his trial and on direct appeal, failed to render reasonably effective assistance during and after the trial and that, as a result, Petitioner's conviction and sentence of death were obtained and affirmed on appeal in violation of Petitioner's rights as guaranteed by Sections 2-101 and 2-111 of the Georgia Constitution, and by the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

FINDINGS OF FACT

Floyd Keeble, the Petitioner's attorney during both his trial and on appeal, had practiced law for approximately eleven years at the time he was appointed to represent the Petitioner. (H.T. 48). He had been a full time Public Defender for the Northern Judicial Circuit of Georgia since May of 1976. (Id.) Mr. Keeble had tried 16 or 17 murder cases (H.T. 48), and defended five capital cases. (Id.)

Counsel was officially appointed to the case on June 10th, two days after the offense occurred on June 8, 1981. (H.T. 59). He had been notified of Petitioner's arrest on the morning of June 9th (H.T. 61). An investigator was utilized to track down all possible leads, a task which was estimated to have taken several hundred hours (H.T. 50). Mr. Keeble himself went to Lexington to a family gathering in an attempt to get character witnesses for the Petitioner (H.T. 121). He spent

2-1/2 - 3 hours, had lunch and spoke to about forty people in this effort. (H.T. 126). At this time no one came forth to speak for the Petitioner. (H.T. 128). He did obtain the name of Petitioner's girlfriend, but did not find her at home (H.T. 129). The father of the Petitioner was not, at that time, willing to say that his son was acting strangely. (H.T. 130).

Mr. Keeble did legal research on this case (H.T. 66-68) and was prepared for trial. (H.T. 50, R. 70). Even though a continuance was requested (R. 69) there is no evidence that preparation was not made, simply that some additional time could be used as is often the case.

Counsel stated at the habeas hearing that he felt there was no question that the offense had been committed and that Petitioner was the actor. (H.T. 69). His main concern was with sentencing (H.T. 69). It was with this in mind that he followed the only defense which he felt was plausible (H.T. 81); Mr. Keeble argued in both the guilt/innocence and sentencing phases of the trial that the Petitioner was not sane at the time of the crime. (H.T. 69).

Mr. Keeble showed himself well aware of the requirements for an insanity defense at the habeas hearing. He knew the proper tests for insanity including both the right-wrong and delusions tests. (H.T. 71). He appeared well versed in the need for and use of experts in developing an insanity defense. (H.T. 73-77). He also knew about the need for other evidence. (H.T. 78). All of the areas necessary for a good insanity defense were covered by Mr. Keeble in Petitioner's trial. He had the Court order a mental evaluation (H.T. 79), and discussed the case with the doctors involved (H.T. 104-105). He decided, even though the testimony was not perfect, that it

would be best to utilize the experts as a means of getting the Petitioner's mental condition into evidence. Several witnesses testified as to Petitioner's mental level during the guilt/innocence phase of the trial (T.T. 208, 276), and others were used during the sentencing phase. (T.T. 132). The time at which to introduce a specific witness would, without question, be a tactical decision to be made by the individual lawyer involved. As Mr. Keeble was aware, all evidence placed before the jury could be mitigating no matter which phase of the trial was in progress at the time of introduction, and would thus be available for use by the jury in reaching a decision as to sentencing (H.T. 205) (See Berryhill v. State, 249 Ga. 442 (1982); Eberhart v. State, 232 Ga. 247 (1974)).

Also in selecting witnesses and deciding what evidence to present, Mr. Keeble testified that he did not introduce a number of potential witnesses, such as fellow employees, for fear that, by introducing good character evidence, the door would be opened for the State to introduce counter-evidence including Petitioner's prior conviction. (H.T. 152).

Regarding the Petitioner's ability both to aid in preparation of his case and to take the stand in his own defense, Counsel again seems to have been aware of the possible advantages and drawbacks and to have weighed all factors prior to reaching a decision. He testified at the habeas hearing that he knew of Petitioner's mental limitations, but felt that Petitioner was well aware of his associates and friends. (H.T. 144). He also stated that he had prepared Petitioner for his testimony on the witness stand, and that he had him take the stand to show the remorse which Petitioner had demonstrated previously. He testified that he was taken totally by surprise at Petitioner's testimony and lack of remorse. (H.T. 51-52).

In dealing with pre-trial publicity and prejudice against Petitioner, Mr. Keeble testified that his investigator checked for inflammatory remarks and allegations in the local paper, and that they had no knowledge of any such article. (H.T. 54). He remembered only one factual article which appeared, not in the local paper, but in that of the adjoining county of Clarke. (H.T. 54).

CONCLUSIONS OF LAW

The decisions on which witnesses to call, whether and how to conduct cross-examinations, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client. Reid v. State, 235 Ga. 378 (1975). The Sixth Amendment right to counsel means "...not errorless, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5 Cir. 1960); Fortson v. State, 240 Ga. 5 (1977); Pitts v. Glass, 231 Ga. 638 (1974).

Counsel in this case has, without question, met this test. He employed an investigator to follow up leads (H.T. 68), went to Petitioner's hometown and met with a number of family members and neighbors (H.T. 121), prepared what to him appeared the only plausible line of defense (H.T. 81) and vigorously defended his client. He conferred with Petitioner (H.T. 51) and made the strategic decisions necessary to present his case in the manner he felt would be most effective.

In Paragraphs 21 and 22, Petitioner contends Counsel, on at least two occasions, admitted his own incompetence. Mr. Keeble's oral motion for a continuance (R. 70) to have more

time to investigate has been twisted by Petitioner into an admission of incompetence. The Court specifically asked Counsel if he could proceed and present the Petitioner's case and received an affirmative response prior to denying the motion. (R. 70). There is no evidence that Mr. Keeble did not speak truthfully in replying that he could proceed despite Petitioner's allegations to the contrary.

Petitioner also asserts that Counsel admitted his own incompetence in his Motion to Challenge the Constitutionality of the Unified Appeal. (R. 135). The statement made by Counsel has been pulled out of context by Petitioner. Paragraph (4) of the Motion states that: "The attorney is not competent to assess the multitude of rights and procedures listed in the Unified Appeal GIVEN THE LIMITED RESOURCES AVAILABLE TO AN INDIGENT IN A DEATH PENALTY CASE." The paragraph goes on with general statements about attorneys for AN indigent. The Court interprets this as an effort to attack the Unified Appeals Process on the basis of funds available, not as an admission of incompetence.

In Paragraphs 23, 24, and 33(a-c), Petitioner contends Counsel was ineffective in various ways regarding the witnesses used to present evidence as to Petitioner's mental state. Among the problems alleged were the failure to interview family, neighbors, school personnel and co-workers and to utilize their testimony as mitigating evidence relating to Petitioner's mental retardation (P 24), failure to obtain an independent expert (P 23, 33(a)), failure to obtain existing psychological evaluations (P 33(b)) and failure to present witnesses as to Petitioner's mental state during the guilt/innocence phase of the trial. (P 33(c)).

The choice of what witnesses to use and when to present them is a matter of trial tactics and strategy. Reid v. State, 235 Ga. 378 (1975). Here Counsel interviewed a number of potential

witnesses, many of whom , including Petitioner's father, were not willing at the time to testify for Petitioner. (H.T. 56, 128, 130). He had the Court order a mental evaluation. (H.T. 79). With this current evaluation specifically geared to investigating Petitioner's mental state in relation to the crime committed, there was no reason to think that an evaluation done in school several years prior to the crime would add anything. Counsel was also limited as to funds since he was an appointed attorney representing an indigent Defendant. Counsel interviewed many people and presented a number of witnesses including three during the sentencing phase; (H.T. 132), however, he stated at the habeas hearing that he was careful as to the witnesses and testimony he selected because once the door was opened by his presentation of good character evidence, the State would have countered with testimony of Petitioner's prior conviction for burglary and his time served. (H.T. 152-153). Again this would have been a tactical decision on the part of the attorney.

Petitioner contends in Paragraph 33(d) that his trial counsel used a legally irrelevant argument in presenting his insanity defense, and that there was no evidence presented in support of a proper insanity defense - either the ability to distinguish right from wrong or the existence of insane delusions - and that no proper insanity argument was presented in the closing. While the right/wrong and insane delusions tests are the proper tests for legal insanity in Georgia (Roberts v. State, 3 Ga. 310 (1847)), the basis upon which Counsel's defense was founded that "no sober, sane man in the possession of his normal faculties would have done what this man did, in the circumstance under which he did it, and in

the manner in which he did it", states a correct principle of law. Brown v. State, 228 Ga. 215, 219-220 (1971); Wilson v. State, 9 Ga. App. 274, 281-282 (1911). Counsel developed his theory with evidence of Petitioner's mental condition and through witnesses' testimony about Petitioner's bizarre behavior around the time of the crime. (T.T. 351-352, 357-358, 360). The bizarre nature of the crime was argued in closing to the jury (T.T. 309-310, 314) and the judge charged thereon. (T.T. 338). Counsel's defense was a valid argument and was adequately prepared and presented. He demonstrated at the habeas hearing that he was well-versed in the various aspects of an insanity defense. (H.T. 69-110). He knew the proper tests for insanity (H.T. 71), and he knew how to prepare an insanity defense. (H.T. 73). The fact that he chose one route, which was legally sound, as a basis for his defense rather than another is again a matter of trial tactics. Effectiveness is not measured by how another lawyer might have handled the case. Estes v. Perkins, 225 Ga. 268 (1969).

Petitioner alleges, in paragraph 32, that Counsel allowed him to take the stand even though Counsel knew he was unprepared, could only admit to having committed the murder and had nothing to say of benefit to his defense. Mr. Keeble stated unequivocally that he talked with Petitioner about his taking the stand and prepared him for the testimony to be given. (H.T. 51). Counsel further stated that he wanted Petitioner to testify to demonstrate to the jury the remorse which Petitioner had previously shown in discussing the murder. (H.T. 51). The obvious hope was to appeal to the jurors' sympathy and demonstrate that Petitioner had no intention of killing the victim. Petitioner's testimony gives no indication that he was reluctant to testify. (T.T. 285-299). To the contrary, the general tone is one of willingness,

cooperation and even a desire to speak. Not only were direct questions answered, but Petitioner gave a rather lengthy narrative as to his intentions when asked if he wanted to say anything to the jury. (T.T. 290). From the responses given, Petitioner appears to have been well prepared. His admission of the crime was not any more prejudicial than his earlier confession to the sheriff. The purpose of his taking the stand was not alibi, but to mitigate the impact of the crime by demonstrating his limitations and lack on intent to kill the victim. The Court finds no merit to these allegations.

In Paragraphs 26 and 27, Petitioner alleges various instances of ineffective assistance by Counsel arising out of the failure of Counsel to move for a change of venue because of community hostility (P 26) and the fact that many of the jurors knew the deceased (P 27). This issue has been dealt with briefly in this Order under Paragraphs 59-61, (p. 23), but will be covered here in more depth.

To the best of his knowledge, Counsel could remember only one article on the incident which appeared, not in the local paper, but in the newspaper for the adjoining county. (H.T. 54). He had no knowledge of any article in any local paper. (H.T. 54). His investigator checked for and found no indication of any inflammatory remarks or allegations. (H.T. 54). Furthermore, Counsel himself indicated that he talked with a number of people in his area, many of whom he knew personally and felt would speak to him freely. (H.T. 190). He stated that he detected no more hostility toward Petitioner than in any murder case he had tried. (H.T. 195). The Georgia Supreme Court has said that a change of venue motion based on three newspaper reports and the "small town syndrome" argument that everybody in town knew everything that was going on where no juror was excused for

prejudice and the newspaper articles were factual in nature failed to show the necessary "pattern of deep and bitter prejudice" within the community required to grant such a motion. Cunningham v. State, 248 Ga. 558, 562 (1981). Petitioner's argument is similarly based except that in his case there was only one newspaper article. There is no evidence in the record to demonstrate the widespread adverse pretrial publicity which would cause jurors to be unable to lay aside their opinions and render an impartial verdict as required under Georgia law. Nelson v. State, 247 Ga. 172 (1981). Although some jurors knew the deceased, most indicated they simply knew who he was (T.T. 25-26, 37, 51, 64-65, 75-76), and a number of jurors indicated they also knew the Petitioner. (T.T. 24-25, 35-36, 48-49, 64, 75). All jurors indicated that their familiarity with the individuals involved would not interfere with their making a fair, unbiased decision. (H.T. 16). Petitioner has presented no evidence to show a deep-rooted prejudice which Counsel failed to discover or ignored in not making a motion for change of venue. Counsel had talked with people and gotten a feel for the amount of hostility present, and decided there were no grounds for a change of venue. (H.T. 196). From the evidence in the record he decided correctly. The Court finds no merit to these allegations.

In Paragraphs 28, 30, and 31, Petitioner alleges Counsel failed to properly voir dire the jury to identify those jurors unlikely to recommend against the death penalty (P 28) and to discover prejudices against blacks (P 30) or mentally retarded persons. (P 31).

Counsel testified that the Witherspoon issue was his main concern. (H.T. 200). He asked questions concerning background, children, relation to law enforcement personnel, whether prospective jurors had ever been the victim of a crime and whether Petitioner's

being black would affect their impartiality (see T.T. 62-72 for sample questions). Such questions would be asked in an effort to determine how various evidence in the trial would affect the individual juror. Counsel stated that his reason for not asking directly about racial prejudice was because he had never had a juror admit to it. (H.T. 200). He felt that the best way to uncover racial prejudice was to ask background questions, which he had done. (H.T. 2-0, 209). There is no evidence in the transcript of any juror who would be so adamantly in favor of the death penalty that the Court's instructions could not be followed. Nor is there any evidence of such prejudices against blacks or the mentally handicapped as would be necessary to show the failure to question the prospective jurors on those areas specifically caused Petitioner to be ineffectively represented by Counsel.

In Paragraph 29, Petitioner alleges that Mr. Keeble erroneously allowed a prospective juror to be excused under the Witherspoon standard. The Court has fully developed this issue in this Order under Paragraphs 52-58 (p. 21-22). The juror was found to have been properly excluded under the Witherspoon test. Furthermore, even though Mr. Monk, the juror in question, was excludable under Witherspoon, Counsel did raise objection to his being excused and requested that he be allowed to remain as being part of a "representative cross-section" of Petitioner's peers. (T.T. 116-117). The Court finds that Counsel was not ineffective in allowing the prospective juror to be excused and that, in fact, everything possible was done under the circumstances to try to prevent his being excluded. The Court therefore finds no merit in the allegation of Paragraph 29.

In Paragraph 25 Petitioner alleges that his trial counsel was incompetent in his efforts to suppress Petitioner's confession.

The basis for Petitioner's argument is the lack of a knowing, voluntary and intelligent waiver of his right to remain silent because of his mental limitations and the circumstances of his arrest. As this Court has already reviewed the confession and found it to be voluntary (see Pingings on Paragraphs 44-51, pp.17-and the arguments to the contrary to be unsupported, it follows that Counsel could not have been incompetent in failing to raise this claim.

In Paragraph 25(a), Petitioner argues that Counsel was incompetent in failing to object to the swearing in of the jurors for voir dire by the prosecutor. As Counsel has stated, he is from the area where this trial took place, knew many of the people in the area and had talked with many of them to get a feeling as to the attitude of the community toward his client. (H.T. 190). It is often a tactical maneuver to object or not object. It could well be that, knowing the community, Counsel felt that an objection would do more harm than good to his client. There is no evidence put forth by Petitioner to show any actual and substantial disadvantage to the conduct of his defense by Counsel's failure to object as required. Washington v. Strickland, 693 F.2d 1243 (1982). Where no objection is made, reversal is not required. Gober v. State, 247 Ga. 652 (1981); Gilreath v. State, 247 Ga. 814 (1981); Altman v. State, 156 Ga. App. 185(10)(1980). The Court finds no merit in this allegation.

Petitioner alleges in Paragraph 34 that trial Counsel was ineffective for failing to object to the Court's malice instruction given during the guilt/innocence phase which, was, on its face, unconstitutional because it established a conclusive presumption against Petitioner of an essential element and thereby shifted the burden of proof from the State. The

Court has dealt with this allegation in detail in the section of this Order dealing with Paragraphs 62-63 (p. 23-25). Since no unconstitutional burden-shifting can be found, Counsel cannot be found ineffective for failing to object to the charge.

In Paragraphs 40 and 41, Petitioner alleges Counsel was ineffective in not objecting to the Court's failure to explain mitigating circumstances and to the instruction given on aggravating circumstances. (See this Order ¶ 71-74, 75-82, p. 27, 28). The Supreme Court dealt with the Trial Court's handling of the "mitigating circumstance" charge. Smith v. State, 249 Ga. 228, 299 (1982). They concluded that the charge concerning mitigation was not improper nor was it subject to the deficiencies discussed in Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981). Smith, supra. They also concluded that the evidence substantiated the finding of the (b)(7) aggravating circumstances (Smith v. State, 249 Ga. 228, 234 (1982)), thereby implicitly finding the jury was properly guided. Again, if the instructions are not found to be improper, Counsel cannot be ineffective for failing to have objected to them. Accordingly, these allegations are found to be without merit.

In Paragraph 39, Petitioner alleges Counsel was ineffective for failing to submit to the Court instructions on mitigating circumstances to be given following the sentencing phase of the trial. The jury was instructed by the trial court during this phase to consider all evidence including any evidence of mitigating circumstances. (T.T. 378). As previously stated, the Georgia Supreme Court has already found the instruction on mitigation given in this case were sufficient. Smith v. State, 249 Ga. 228, 229 (1982). Thus, even if Counsel should have submitted instructions to the Court, the failure to do so would be harmless as the Court gave sufficient instructions on its own.

In Paragraph 34(A) Petitioner alleges that Counsel failed to render effective assistance because he did not request a manslaughter instruction be included in the jury charge during the guilt/innocence phase of the trial.

Again, this topic has been developed more fully in the section of this Order dealing with paragraphs 62-63 (p. 23-25). The Court found that there was no requirement, given the evidence in this case, that a manslaughter instruction be given as a matter of law. The Court cannot find Counsel was ineffective for failing to request a charge for which there was no evidence.

Accordingly, the Court finds that there is no merit to the allegations of Petitioner presented in paragraphs 34, 34(A), 39, 40 and 41.

In Paragraphs 35 and 36, Petitioner alleges that during the sentencing phase Counsel failed to call some witnesses who were present at the courthouse and restricted the testimony of others. Counsel used three witnesses during the sentencing phase to testify to Petitioner's strange and unusual behavior. (H.T. 132). Whether or not other potential witnesses were available, it is a tactical decision of counsel as to what witnesses to present in what order. Reid v. State, 235 Ga. 378 (1975). Counsel states that, regardless of what is now claimed, at the time he talked with Petitioner's father the latter was unwilling to say that his son was acting strangely. (H.T. 130). In fact, he told Counsel immediately after the first phase of the trial that he did not want to testify. (H.T. 56-57). Counsel could not account for the apparent discrepancy presented by the affidavit. (H.T. 56).

Mr. Keeble testified that his restrictions on the testimony of witnesses so as to cover only certain areas were an effort to prevent so-called "good character" evidence which would have opened the door for the State to present counter-evidence. (H.T. 152).

Counsel had talked with the law enforcement officers who would have testified and decided that he did not want the jury to hear of Petitioner's prior conviction and imprisonment to which the officers would have testified. (H.T. 53). Counsel stated that it was his understanding that evidence of morality and work ethics was dangerous and could well allow the State to introduce adverse testimony. (H.T. 155). Once again the decision of what evidence the jury should and should not hear would have to be classified as trial tactics. The Court finds no merit in this allegation.

In Paragraph 37, Petitioner alleges that Counsel failed to object during the sentencing phase to prejudicial testimony about personal characteristics of the decedent. The Court has reviewed this testimony and, as stated elsewhere in this Order P 64-68 (p. 25-26) finds no error in its admission. Thus Counsel cannot be found ineffective for having failed to object. Accordingly, the Court finds the allegations set forth in Paragraph 37 to be without merit.

In Paragraph 38, Petitioner alleges Counsel failed to render effective assistance when he failed to object to the prosecutor's closing argument which was designed to appeal to passion and prejudice and made misleading statements about the only aggravating circumstance.

The Court has found elsewhere in the Order that the Prosecutor's closing argument was not so inflammatory and prejudicial as to violate Petitioner's constitutional rights. (P 69-70, p. 26-27). Accordingly, Counsel cannot have failed to provide effective assistance to Petitioner by failing to object, and this allegation must be found to be without merit.

In Paragraph 43, Petitioner alleges that Counsel failed to render effective assistance on appeal in that his brief consisted of

"canned arguments" which he further weakened in argument before the Supreme Court about the failure to define "mitigating circumstances" by an erroneous assertion, and that he failed to raise numerous legal issues.

The issues to be raised on appeal would be within the province of the attorney handling the appeal. Counsel raised a number of issues, many of which Petitioner's present counsel have reasserted in this habeas petition. That the omission of other possibly less effective allegations of error was allowed by trial counsel does not mean that he must be found constitutionally ineffective. Effectiveness is not measured by how another lawyer might have handled the case. Estes v. Perkins, 225 Ga. 268 (1969).

Likewise, the arguments used by a lawyer to support his contentions need not be identical to what would be used by every other lawyer. However, most lawyers seem to prefer to use grounds, especially on appeal, which have already been successful in previous cases. If the use of "canned arguments" constitutes ineffectiveness, then the Court fears that the vast majority of attorneys would have to be found ineffective. It seems to be far more demonstrative of the time and effort put forth by an attorney if he finds a previous case which supports his own arguments.

This Court has already found that the trial court's jury charge on mitigating circumstances was adequate and did not violate Petitioner's constitutional rights, (see Findings on Paragraphs 34, 34 (A), 39, 40 and 41, pp. 12-14), so any possible error in Counsel's argument to the Supreme Court on this issue could only be, at most, harmless error. The Supreme Court had the record of the case and conducts its own review of the facts.

The Court finds no evidence to support Petitioner's

contention that his Counsel on direct appeal failed to provide him with reasonably effective assistance at that stage of the proceedings. Accordingly, these allegations are found to be without merit.

44-51

In Paragraphs 44-51, Petitioner alleges that his post-arrest confession was extracted without a valid, knowing, voluntary and intelligent waiver (P 44-48). He also alleges that the confession was the result of an unnecessarily prolonged detention following his arrest and prior to being presented to a judicial officer or being appointed counsel (P 49-51). Petitioner claims that this violated his Fourth, Fifth, Sixth and Fourteenth Amendment rights under the United States Constitution.

FINDINGS OF FACT

The Court has reviewed the trial transcript and the record of the Jackson-Denno hearing (R. 86-108). The trial court found as a "matter of fact that the Petitioner's statement was freely and voluntarily made." (R. 108). Upon an examination of the testimony of the Sheriff and Deputy involved, this Court concludes that the facts support the trial court's finding. Both the Sheriff and Deputy Cartee state that Petitioner was read his rights, said he understood them and asked no questions. (R. 88, 89, 93, 103, and 106). They testified that Petitioner was alert, friendly and not under the influence of any alcohol or drugs (R. 88, 89, 94, 103, 104). Petitioner never requested an attorney either before or during the questioning. (R. 89, 93, 104, 105, 107). When asked, Petitioner said that he wanted to make a statement. (R. 93). There is no evidence that this was in response to any promises or coercion. To the contrary all testimony indicates that there were no threats or promises made and that the statement was freely given. (R. 93, 101, 104, 105, 106, 107). Petitioner gave his statement in a narrative form

(R. 99-100) and never asked the Sheriff that he be allowed to stop or that he not be questioned further without an attorney (R. 93, 95-96, 105, 107). Deputy Cartee wrote down the statement as Petitioner gave it and then read it back to him to assure its accuracy. (R. 94-95). Petitioner was then given the statement to look over. (R. 95, 99). Petitioner signed the statement after saying it was correct. (R. 95, 99). He also signed a shorter statement given in response to the Sheriff's question of why he had committed the offense. (R. 95, 99).

No new facts about Petitioner's circumstances immediately preceding the confession were added during the testimony at trial. Again, both the Sheriff and Deputy testified that Petitioner was alert and bright (T.T. 225), not under any drugs (T.T. 226), and willing to talk (T.T. 226). He was asked at least twice if he wanted an attorney and said no. (T.T. 226). They repeated that his statement was taken down, read back to him and shown to him prior to his signing it. (T.T. 227). Petitioner was cooperative, talked clearly without constant questioning and never requested that he be allowed to stop. (T.T. 232, 233).

Regarding Petitioner's allegation that his statement was the result of an illegally prolonged detention prior to being presented to a judicial officer or being appointed counsel, this Court has again reviewed the record for evidence to support the allegation. Petitioner was arrested about 11:30 P.M. on June 8th after turning himself in (T.T. 187). He was taken to the Clarke County Jail and booked, but was then left to rest until the next day (R. 96). No one questioned the Petitioner during the night of his arrest while he was exhausted. (R. 98). After he had had an opportunity to rest and eat (T.T. 270), the Sheriff and Deputy Cartee had the Petitioner brought to a small room

where he was read his rights and asked if he wanted to make a statement (T.T. 225, 226). Petitioner was asked at least twice if he wanted an attorney in addition to the reading to him of his constitutional rights. (T.T. 225, 226). On both occasions he said no he did not. (T.T. 226).

CONCLUSIONS OF LAW

The voluntariness of a statement must be judged by the statement and the totality of the circumstances surrounding the giving of the statement. (Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980)). In this case, the petitioner was arrested, read his rights, allowed to rest and eat to regain his strength, and then read his rights again prior to being questioned. At no time does the evidence indicate that the petitioner did not understand his rights. He did not ask any questions even when given time to rest and think after being arrested. He never asked for an attorney. He simply said he wanted to make a statement and proceeded to do so.

The Supreme Court of Georgia has ruled that showing that a defendant is illiterate and that he was placed in special education classes while in school does not, without more, show that he was incapable of understanding his Miranda rights when they were read to him. Donaldsen v. State, 249 Ga. 186 (1982). The fact that a defendant may have suffered from a mental deficiency or was illiterate would not render him capable of making a valid confession. Coversen v. State, 162 Ga. App. 497 (1982), Parker v. State, 161 Ga. App. 478 (1982), C.R.T. v. State, 148 Ga. App. 628 (1979).

In this case, there is no evidence of coercion or force to gain a confession. There is also no evidence other than some

testimony concerning his being slightly retarded to show that the Petitioner did not understand his rights when read to him. There was a delay in his being questioned, but the purpose was apparently to allow the Petitioner to rest and eat. It appears to this Court that the Petitioner would be far more likely to understand something when alert and comfortable and having had time to consider what he had been told. Had he been read his rights one time that night while exhausted and hungry, and then interrogated immediately, the chances of confusion would have been much greater.

Petitioner alleges in paragraph 51 as further support for his claim that his waiver and confession were the fruits of an unlawful detention that he was not taken before a judicial officer for his commitment hearing until July 3, 1981, following his arrest on June 8, 1981. The legality, duration and conditions of detention are matters relevant for a trial court to consider in determining if a statement is voluntary; it does not require as a matter of law that a confession be rendered inadmissible. Wilson v. State, 229 Ga. 395, 397 (1972). Failure to have a commitment hearing at all is not reversible error and does not automatically require a reversal of a conviction. State v. Middlebrooks, 236 Ga. 82 (1976). The time which elapsed prior to Petitioner's commitment hearing was one fact before the trial court when the determination was made that the statement given was voluntary and knowing. Furthermore it is questionable as to whether this argument is even applicable since Petitioner's statement was given approximately twelve hours after his arrest. At this point the detention was not unlawful as a commitment hearing is required only within forty-eight hours of a warrantless arrest (O.C.G.A. §17-4-62) or seventy-two hours of an arrest with a warrant (O.C.G.A. §17-4-26).

In Petitioner's case, a Jackson v. Denno hearing was held, and his statement was found to have been voluntarily and knowingly made. The facts of Petitioner's capabilities, the time of appointment of his attorney, the time of his commitment hearing and the facts surrounding his detention and confession were before the trial judge. Factual and credibility findings in regard to admissibility of a statement based on voluntariness made by a trial judge must be accepted by reviewing Courts unless such determinations are clearly erroneous. Hurt v. State, 239 Ga. 665(2)(1977). The state psychiatrist testified that Petitioner was aware of the charges against him, reasonably able to understand the legal process, understood the possible consequences of being found guilty and had the skills to communicate with an attorney. (T.T. 281-282). In light of this evidence as well as the care taken to inform Petitioner of his rights and to allow him time to recover from his exhaustion so as to be better able to "think straight", this Court does not find that Petitioner's statement was involuntary or unknowing, nor that it was the result of an unnecessarily prolonged detention.

Accordingly, the allegation in paragraphs 44-51 are found to be without merit.

52-58

In Paragraphs 52-58, Petitioner alleges that a death-scrupled juror was improperly excluded thus violating his Sixth, Eighth, and Fourteenth Amendment rights.

FINDINGS OF FACT

The Court has reviewed the individual, sequestered voir dire of veniremen about their views on capital punishment. (T.T. 91-131). Venireman Monk indicated there were no circumstances under which he would vote for the death penalty and was excused for cause. (T.T. 113-117).

CONCLUSIONS OF LAW

The Court finds that the prospective juror was not improperly excluded under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

Petitioner has contended under Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), that the venireman was improperly excluded because Witherspoon is not a ground for challenging prospective jurors.

In Adams, the Supreme Court struck down a Texas statute which excluded jurors in a capital case inconsistently with Witherspoon. In rejecting the State's argument that the statute in issue and Witherspoon could coexist as separate and independent bases for excluding jurors, the Court stated that Witherspoon is not a ground for challenging prospective jurors. "It is rather a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out." Adams, supra, 448 U.S. at 47-48. Here, the juror was not excluded on any basis broader than that permitted by Witherspoon.

The juror in question stated that his feelings were based on his religious beliefs, and that the crime itself would make no difference. (T.T. 115). He stated at least three times in response both to Counsel's efforts to rehabilitate him and to the Court's direct questions that he was conscientiously opposed to the death penalty and could not impose it. (T.T. 116).

Even though the juror was properly excluded under Witherspoon, Counsel did raise objection to his being excused and requested that he be allowed to remain as part of a "representative cross-section" of Petitioner's peers. (T.T. 116-117). It

appears that Counsel did everything possible to prevent the venireman's exclusion.

Accordingly, the allegation in Paragraphs 52-58 is found to be without merit.

59-61

In Paragraphs 59-61, Petitioner contends that he was denied his right to trial by a fair and impartial jury because eight jurors who served on the case knew the victim. He further alleges that the jurors were not asked if their relationships with the victim would affect their impartiality.

FINDINGS OF FACT

During voir dire, Counsel asked each panel of jurors whether their deliberations would be influenced by the fact, among others, that his client, a young black man, was accused of killing Mr. Dan. (T.T. 31; 44-45; 58-59; 71-72; 84). No veniremen responded to the questions.

CONCLUSIONS OF LAW

There are two types of challenges to an individual juror for cause: for principal cause and for favor. Jordan v. State, 247 Ga. 328, 338 (1981). Challenges for favor are based on admissions of the juror, or facts and circumstances raising a suspicion that the juror is actually biased for or against one of the parties. Id.

The victim in this case was an elderly man who had operated a small grocery store in a rural community for a number of years. Veniremen indicated that they knew or knew of the victim. No jurors indicated their knowledge would influence their deliberations. These facts, without more, are not sufficient to show that jurors may have been biased against Petitioner.

Accordingly, this allegation is found to be without merit.

62-63

In Paragraphs 62-63, Petitioner claims that the trial court's instructions on malice were impermissibly burden-shifting, and that the failure of the trial court to charge the jury on the offense of manslaughter violated his Fourteenth Amendment right to due process of law.

FINDINGS OF FACT

The Court has reviewed the instructions to the jury in the guilt/innocence phase. (T.T. 325-342). The Court has also reviewed the evidence presented in the case, particularly the testimony of Petitioner. (T.T. 285-299).

CONCLUSIONS OF LAW

The instruction with which Petitioner takes issue provides: "Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart."

Petitioner correctly states the law in Sandstrom v. Montana, (442 U.S. 510 (1979)), that a jury instruction on an essential element which can reasonably be understood by the jury either to erect a conclusive presumption upon the finding of certain facts, or to shift the burden of persuasion to the defendant is unconstitutional. However, a single instruction to the jury may not be judged in isolation but must be reviewed in the context of the overall charge. Cupp v. Naughten, 414 U.S. 141 (1973); Johnson v. State, 249 Ga. 812 (1982); Wells v. State, 247 Ga. 792 (1981).

The same malice charge as that given in Petitioner's trial (T.T. 336) has been held to not cause an unconstitutional burden-shifting when viewed in the context of the overall charge. Lamb v. Jernigan, 683 F.2d 1332 (11th Cir. 1982). The Court has reviewed the trial court's entire charge to the jury. (T.T. 325-342) and finds no violation of Petitioner's

constitutional rights by the creation of a conclusive presumption. Rather, the trial court appears to have been very careful to convey to the jury that the State was required to prove each individual element of each crime beyond a reasonable doubt. (T.T. 326, 327, 330, 339). It does not appear to this Court that any reasonable juror would infer a burden on Petitioner to prove a lack of malice given the trial court's instructions as a whole.

Petitioner has also claimed error from the failure of the trial court to charge on the lesser included offense of manslaughter. Under Georgia law, voluntary manslaughter is the killing of another human being under circumstances which would otherwise be murder and if the act is solely the result of a sudden, violent and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person. O.C.G.A. §16-5-2(a). Whether there is a slight evidence warranting a charge on voluntary manslaughter is a question of law for the courts to determine. Henderson v. State, 234 Ga. 827 (1975).

This Court, upon a review of the evidence does not find that Petitioner acted solely as a result of a sudden, violent and irresistible impulse. The Georgia Supreme Court has ruled that being discovered during the commission of a burglary is not as a matter of law such provocation as would require a charge on voluntary manslaughter. Horton v. State, 249 Ga. 871 (1982). Similarly the fact that a robbery victim put forth some minimal resistance to being robbed should not automatically provide such extreme provocation. In this case the Court finds that the evidence is not such as would require the giving of a jury charge on voluntary manslaughter.

As to involuntary manslaughter, the stabbing of another

being a felony, the trial court did not err in failing to give this charge. Williams v. State, 249 Ga. 6, 8 (1982); Cervi v. State, 248 Ga. 325, 329 (1981).

64-68

In Paragraphs 64-68, Petitioner claims that the admission into evidence of testimony from the victim's stepson during the sentencing phase violated his rights as guaranteed by Sections 2-101, 2-111 and 2-114 of the Georgia Constitution and the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

FINDINGS OF FACT

The victim's stepson, Robert E. Sanders, was included in the list of witnesses provided by the prosecution. (R. 137). The stepson testified during the guilt/innocence phase (T.T. 203-206) and in the sentencing phase. (T.T. 347-349).

CONCLUSIONS OF LAW

Petitioner has objected to the admission of the stepson's testimony concerning the victim during the sentencing phase. He argues that the testimony is irrelevant in that it concerned neither the offense nor offender so that its admission was an appeal to passion and prejudice.

The Court has reviewed the stepson's testimony in the sentencing phase. His testimony was unemotional and brief. The evidence complained of is very similar in nature to that approved of in Moore v. State, 240 Ga. 807, 818 (1978), and Corn v. Hooper, 244 Ga. 28, 29 (1979). The Court finds no error in its admission.

Accordingly, this claim for relief is found to be without merit.

69-70

In Paragraphs 69-70, Petitioner alleges that the prosecutor's closing argument, given during the sentencing phase, violated his rights as guaranteed by Sections 2-101, 21-111 and 2-114 of the Georgia Constitution and the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States in that it was a flagrant appeal to passion, prejudice, primitive vengeance and other arbitrary factors and was misleading as to the statutory aggravating circumstances at issue.

FINDINGS OF FACT

While this issue was not directly addressed on appeal to the Georgia Supreme Court, Petitioner did argue that his sentence was imposed under the influence of passion, prejudice and other arbitrary factors. Smith v. State, 249 Ga. 228, 233 (1982). Not only did the Supreme Court address the specific error alleged, the Court also made an explicit finding that "the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor." (Id.)

CONCLUSIONS OF LAW

In the statutorily mandated independent review of death sentences, the Supreme Court must determine whether or not the sentence of death "was imposed under the influence of passion, prejudice or any other arbitrary factor." O.C.G.A. §17-10-35(c)(1). In making this determination they examine the entire record for the presence of factors improperly impacting on the decision to impose a sentence of death. Conner v. State, 251 Ga. 113, Vol. 36 No. 31 GLR 83, 86 (1983). In its review of Petitioner's direct appeal, the Supreme Court

found expressly that the death penalty had not been unconstitutionally imposed under the influence of passion, prejudice, or other arbitrary factors. Smith v. State, 249 Ga. 228, 233 (1982). Implicit in this finding, given the compulsory nature of the review of the entire record, is the fact that the Supreme Court did not find any violation of Petitioner's constitutional rights in the prosecutor's closing argument.

Even if the finding on direct appeal were to not be applied, it has been held that neither the Eighth Amendment nor O.C.G.A. §17-10-35(c)(1) forbids a death penalty based in part on an emotional response to factors in evidence which implicate valid penological justification for the imposition of the death penalty. Conner v. State, supra at 90. This Court feels, on review of the record, that this holding would apply in this case.

Accordingly, the allegations in Paragraphs 69-70 are found to be without merit.

71-74

In Paragraphs 71-74, Petitioner claims that the trial court failed to guide the jury properly as to the O.C.G.A. §17-10-30(b)(7) (Ga. Code Ann. §27-2534.1(b)(7)) aggravating circumstance so that its imposition violates his Eighth and Fourteenth Amendment rights. (See also p. 13 of this Order.)

FINDINGS OF FACT

The Supreme Court has concluded that the evidence substantiates and supports the finding of the (b)(7) aggravating circumstance. Smith v. State, supra, at 234.

CONCLUSIONS OF LAW

Implicit in the finding of the Supreme Court is the conclusion that the jury's discretion was properly guided as

to the (b)(7) aggravating circumstance.

Accordingly, this allegation is found to be without merit.

75-82

In Paragraphs 75-82, Petitioner alleges that the trial court inadequately instructed the jury concerning mitigating circumstances so that his death sentence violates his rights under the Eighth and Fourteenth Amendments. (See also p. 13 of this Order).

FINDINGS OF FACT

The Supreme Court has already upheld the charge on mitigating circumstances. Smith v. State, supra, at 229(2).

CONCLUSIONS OF LAW

Findings of the Supreme Court are binding upon this Court for the purpose of review. Elrod v. Ault, 231 Ga. 750 (1974).

Accordingly, this claim for relief is found to be without merit.

83-85

The Supreme Court has already concluded that the (b)(7) aggravating circumstance was properly applied in this case. Smith v. State, supra, at 233(7).

86-90

The Supreme Court has already concluded that Petitioner's death sentence is not excessive or disproportionate. Smith v. State, supra, at 235.

91-97

In Paragraphs 91-97, Petitioner attacks the statutory provisions and practices governing appellate review of death sentences generally and as applied in his case.

Georgia's capital sentencing statute has been held constitutional. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

Accordingly, this allegation is found to be without merit.

98-101

Petitioner's allegation that the death sentence is being unconstitutionally applied is found to be without merit.

102-103

Petitioner's allegation that his death sentence is being exacted pursuant to a pattern and practice to discriminate on the basis of race, sex, and poverty is found to be without merit.

104-105

Petitioner's challenge to electrocution as the means of execution is found to be without merit.

WHEREFORE, the Court having found all allegations in the Petition to be without merit, this Petition is hereby denied.

This 16th day of April, 1984.

Hal Craig

HAL CRAIG
JUDGE, SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

Clerk's Office, Supreme Court of Georgia

ATLANTA 2/19/85

The motion for a rehearing ~~was~~ denied today:

Case No. 41276, 41504, Smith v. Francis, Warden

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Smith v. Francis (2) 84-6780 Appendix

THE COURT: Can we excuse him and let him go back and see about our children?

MR. KEEBLE: Yes, sir.

THE COURT: All right. You're excused. Call your next witness.

(Witness excused)

MR. KEEBLE: Your Honor, the defense would call Dr. Everett Kuglar.

DR. EVERETT CLARK KUGLAR

called as a witness in behalf of the defendant, first having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KEEBLE:

Q Would you state your full name for the record, please?

A My name is Everett Clark Kuglar.

Q And what is your position with the State of Georgia, Dr. Kuglar?

A I am Superintendent of the Georgia Regional Hospital at Augusta, in Augusta.

Q And you are a medical doctor?

A Yes, I am a medical doctor.

Q What is your medical specialty, sir?

A My medical specialty is that of psychiatry.

Q Dr. Kuglar, if you will, would you give us a background as to your formal education, please, sir?

MR. TISE: If Your Honor please, the State is very familiar with Dr. Kuglar's qualifications and his expertise in this area, and we would stipulate to them.

THE COURT: All right. The doctor is stipulated as an expert. You may proceed.

Q And you are a psychiatrist, Doctor?

A Yes.

Q Now, Dr. Kuglar, did you on occasion have a opportunity to examine a one William Alvin Smith?

A Yes, I have examined William Alvin Smith.

Q And I will refer you to the defense table to the young man with the dark blue knit shirt. Is that the same young man that you examined?

A Yes.

Q Would you tell the ladies and gentlemen on how many occasions that you examined this young man, Doctor?

A I personally examined him on two occasions, one being July the 31st of this year, and again yesterday, September the 14th.

Q So you examined him yesterday afternoon?

A Yes. That's correct.

Q Approximately how long did your examination of this young man take place on July 31st of this year?

A Approximately one hour.

Q All right. And your examination yesterday?

A Oh, I would say roughly twenty to thirty minutes. This was my personal examination. Other psychological and medical tests were done.

Q So other psychological and testing was done at your request and under your supervision, is that correct, Doctor?

A That is correct.

Q And I would assume that you reviewed these records and agreed with the analysis contained therein?

A That is correct.

Q Now, Doctor, I will refer you, if you will, to your letter under date of August 18, 1981. In a portion of your letter, Doctor...and, of course, you can fully explain any contents of that letter that you wish. But you said that Mr. Smith complained of "frequent headaches and dizzy spells".

A That is correct.

Q He made specific complaints of this to you?

A Yes.

Q And, in your evaluation, what did you find as a result of these complaints, Doctor?

A Well, as a result of his making this specific complaint, we did an electroencephalogram which is a brain...so-called brain wave test which measured the electrical conductivity and impulses from the brain. It usually picks up any gross abnormalities that are found within the brain tissue, at least the cortical brain tissue. This was normal. We also had him evaluated by Dr. Harold

Collins, a Board Certified Neurologist, who could find no neurological abnormalities.

Q All right. Now, Doctor, let me ask you this. From this type examination, would any evidence of mental retardation show up from this examination?

A From the brain wave test, no. He also received, as part of our evaluation, a Wechsler Adult Intelligence Test, commonly called a Wais .

MR. KEEBLE: Can all of you gentlemen hear Dr. Kuglar? You can't?

Q Doctor, I do apologize. We're having a little trouble with our system and I would ask... Some of the jurors are having difficulty hearing you. So, if you would, just speak up a little bit more.

A All right.

Q You said some other tests were run.. Excuse me. What was your answer to the last question, Doctor?

A I think what you had asked me was that would the test we were talking about pick up mental retardation or the individual's intelligence, and I answered that question by saying, no, that the brain wave test, nor the X-rays, nor the neurological examination, which would pick up any organic illness in the brain, would not pick up one's intelligence or IQ. Then I said that we also did a Wechsler Adult Intelligence Test, commonly called a Wais , on this individual in order to ascertain his intelligence.

Q So this test was conducted on this individual?

A Yes.

Q All right. Now, Dr. Kuglar, do you have the results of that examination?

A Yes, we do.

Q And what were your findings in this regard?

A The Wechsler Adult Intelligence Test is divided into two sections. One is verbal skills. The other are performance skills, or the potential to remember, figure out new situations, to calculate, et cetera. Therefore, we have two subsections, each scored separately and then averaged. On his verbal IQ, this was 71, his verbal skills. This is in the upper range of mild retardation at the borderline range of normal. His performance skills were measured at 61, which is in the range of very mild retardation. And his full-scale score of 65 is in the mildly retarded, the upper limits of the mildly retarded range.

Q Now, Doctor, from your experience and from your training, do you have an opinion as to what a mental age of someone with this IQ would be?

A Mental age, by the use of IQ tests, is figured on 16 as being average. That is, that when an individual reaches roughly the age of 16, from that particular point on, you give them the same test and you do not expect test results to be related to age. So 16 is the average. If you talk about a very bright individual, you would talk about a score like 18. Okay.

Most of the people that you test, you talk about 16 as being the average. This particular individual would test somewhere between 10 and 11 as a mental age. That is, that the logic, the calculation abilities, planning abilities, the ability to perceive things is roughly that of a youngster in the 10 to 11 year age range. Remember, though, that 16 would be the average for most adults.

Q Now, of course, Doctor, you did find that this young-- and here ,again, I refer to your letter -- Well, Mr. Tise may want to cross examine you on that. That's all the questions I have, Doctor, at this time.

MR. KEEBLE: That's all I have at this time, Your Honor.

THE COURT: All right, Mr. Tise.

CROSS EXAMINATION

BY MR. TISE:

Q Doctor, you evaluated the defendant in this case to determine if he was competent to stand trial, did you not?

A That was part of the evaluation, yes, sir.

Q That was part of your evaluation?

A Yes, sir.

Q What were the points used to determine if the defendant was capable to stand trial at this time?

A There are four major points considered when we talk about a person being competent to stand trial. One point is that the person must be able to become aware or is aware of the charges against him. Another point is that he must have a reasonable or

be able to reasonably understand the legal process in criminal or trial proceedings. Another point is that an individual must be able to understand the possible consequences of being found guilty with a crime or with an alleged crime of which they're charged. Another point is that they must have skills, communication skills enough to communicate with their attorney in preparing or helping to prepare their defense. And the fourth point, which is an unwritten point, is that they must not be so psychotic or retarded that they basically cannot understand what is happening. Their contact with reality must be good enough that they understand what is happening in any criminal proceedings against them.

Q And what were your findings?

A We felt that Mr. Smith basically met all of the points for being competent to stand trial as a result of our complete evaluation.

Q Now, Doctor, during your examination, were you able to tell if the defendant knew right from wrong?

A Yes. One of the other points that we are asked to look into is the person's mental state to ascertain if they are able, one,at the time we examine them, to ascertain right from wrong in relation to any alleged illegal act which they may have committed. The other is to look to see if they have the type of mental illness where they may have been mentally ill in the past but not be at the time we examine them, which would reduce responsibility under Georgia Law.

Q What was your finding in this area?

A At the time we examined him, we could find no evidence that significant mental illness had existed in this individual in the past and that he was able to determine right from wrong at the time of our evaluation.

Q How about at the time of this incident?

A As I say, we could find no evidence of any type of mental or brain disorder which would have existed in the recent past. We examined him approximately five to six weeks after the alleged act.

Q All right. Now, did you find any delusional compulsion, anything of that nature, that would make this defendant commit such an act?

A No, sir. We could find no evidence of delusions or compulsions, or delusional compulsions.

Q Any mental disorder?

A We could find no evidence of any mental disorder present other than the mild mental retardation.

Q Any mental disease?

A No, sir. We could not find any of this.

Q Any defect whatsoever?

A As I say, with the exception of the mild mental retardation, we could find no evidence of any mental or brain disorder.

Q Were you able to determine his criminal responsibility

in this matter? Was he responsible for his act?

A It would be our opinion, as we understand the Georgia Code, that this individual would be responsible for any criminal act he may have committed.

Q Now, Doctor, approximately how many people are there, say in the United States, that can be found under the same criteria as this defendant?

A I assume by this you mean who has his approximate amount of intelligence, an IQ in the 60 to 70 range.

Q Yes, sir.

A Somewhere in the ballpark of ten per cent of the population in this country has an IQ in that range.

MR. TISE: Thank you, Doctor.

THE COURT: Can we excuse the Doctor, gentlemen?

MR. KEEBLE: Yes, sir.

MR. TISE: The State has no objection.

THE COURT: You may go, Doctor. Thank you. Call your next witness.

(Witness excused)

MR. KEEBLE: Your Honor, I would call the defendant to the stand.

THE COURT: Very well. You may come to the stand, Mr. Smith.

We appreciate you coming, Doctor.

DR. KUGLAR: Thank you, sir.

APPENDIX E

WILLIAM ALVIN SMITH

called as a witness in his own behalf, after having first been duly sworn by Mr. Keeble, testified as follows:

DIRECT EXAMINATION

BY MR. KEEBLE:

Q Now, I will call your attention to June the 8th of this year. Do you remember that day?

A Yes.

Q Where did you stay the night before, William?

A At home.

Q After you got up, what did you do?

A I ate, like I always do.

Q You ate and what?

A I ate and then I left.

Q And where did you go?

A Up to my aunt's house.

Q And who is that?

A Ruby Dorsey.

Q How long did you stay over there?

A Not long.

Q And then where did you go?

A I went to Johnny Howard's house.

Q Who is he?

A He's a friend of ours.

Q And what did you do over there?

A Nothing, but got some water; sat around, you know, and talked.

Q Sat around and talked?

A Yes, sir.

Q And, about what time was it that you left there?

A A few minutes after I got there.

Q You don't know what time it was?

A No.

Q Were you walking?

A Yes.

Q In relation to Lexington, where does he live?

A Fairground.

Q Fairground community?

A Yes.

Q And you left walking?

A Yes.

Q And where did you go then?

A I started walking towards town like I always do, and went through Black Bottom. And, on the way to Mr. Dan's Store, I said I'd stop and get me a pack of cigarettes because I didn't have no cigarettes.

Q Now, how far was it from that, the last place you was. You walked all the way to Mr. Dan's place?

A Yes.

Q And how far is that? Do you know?

A No, not exactly.

Q Okay. Now, when you got to Mr. Dan's place, tell the ladies and gentlemen of the jury what happened.

A Well, I went in there like I always do. I got in the store and he was laying up..you know, sometimes he'd be asleep in the chair, like he always do. And he woke up and he looked at me and he didn't speak to me like he usually do. I asked him for a pack of cigarettes, and he said, "What kind?" I said, "Winstons." So he went to get the cigarettes and, when he retched at the cigarettes, I retched at him and ...

Q Wait a minute. You retched (sic) at him?

A Yes.

Q What do you mean by that?

A You know, when he retched at the cigarettes, I retched at him, you know, just... Then he, you know, had the hammer and, when he grabbed that hammer, you know, he started forcing his self, you know, and I got carried away.

Q You got carried away? What did you do?

A All I know, I was stabbing. That's all. He said something to me, but I don't know what he said.

Q And then what did you do?

A Well, he started back to the back and then he fell, and, when he fell, the hammer, it fell, too, and I guess I picked the hammer up and hit him with it.

Q Then what did you do?

A Then I went to the door. That's when I saw Willie Robertson.

Q Do you remember what you said to him?

A No, not quite. It happened so quick to me, I didn't know.

Q And, then what did you do?

A Well, I went back in the store and then I retched down in his pocket and got his pocketbook out. And then I went in the cash register and got that money, and then I started running.

Q You started running?

A Yes.

Q Had you planned to rob Mr. Dan when you went in that store?

A No. I... See, I usually walk all the time, anyway. When I got...you know, when I got to the store, I went in there just like I always do, I told you. Because I have been in there when he wasn't even in the store and didn't touch a thing. That morning, I got in the store and, as he moved, I moved -- just like that.

Q Now, you ran?

A Yes.

Q Where did you run to?

A To the woods in Black Bottom.

Q About how far away is that from Mr. Dan's store?

A I couldn't say. It was a few blocks from there.

Q Now, William, when you were in school, you had special

classes? Is that right?

A Yes.

Q You don't know what kind of classes they were?

A I know that, you know, I was... Like I told him, I wasn't bright, but I wasn't dumb, either, you know. But I was slow on learning. Some of the things, I didn't...the words and stuff I didn't know.

Q And what grade did you drop out in school?

A Ninth.

Q The end of the ninth or the first of the ninth grade?

A First. I didn't go back to school. I completed the eighth but didn't go back to the ninth.

Q So you didn't even go into the ninth grade at all?

A No.

Q And you don't remember what you said to Willie Robinson?

Q Well, he got to the door...he asked me...he said... he asked me what was I doing, you know. And, at first, I didn't said nothing, you know. I looked at him. And I guess he thought I was gonna hit him, too, or something like that. And I told... I said, "Damn," you know. I said, "Damn," and I said... I'm not sure if I told him, "I killed Mr. Dan," or "I think I killed Mr. Dan." But I believe what I said, I told him...I looked at him and I said, "I think I done killed Mr. Dan." And then he looked at me and he said, "What?" Just like that. And he backed

off, you know. That's when he went to the Sheriff.

Q That's when you ran?

A (Nodded head affirmative.)

Q Do you have any other statements you want to say to the jury?

A Yes. I didn't mean to kill Mr. Dan and I ain't had nothing against Mr. Dan or nothing, and I'm sorry I did it. I didn't go on and tell the Sheriff that. I told myself that when I was in the bushes, when I run. I stopped and thought about it and I cried, you know, because it hurt me because Mr. Dan been knowing me and my folks as long as I can remember. And he ain't never said nothing smart or, you know, nothing to us or nothing. He always have been good to me. I can say that. And I have went in there when he was out of the store and waited I don't know how many minutes for him to come back. When he come back, he always, you know, looked at me and... I remember being there two or three days before this, you know, and he was on the outside by the drink machine. And there was some birds and stuff out in the yard, you know, and, you know, me and him sat out there and laughed at it for a while. And he asked me about my aunt Florene, the one that stays in Atlanta. Most every time I go up there, he always asks me about my aunt. He knowed my aunt and mama and them when they was little, you know. They used to come in the store. I never intended to kill him. I didn't even intend to touch him. That's all I've got to say.

MR. KEEBLE: Mr. Tise.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. TISE:

Q You say Mr. Turner was asleep when you went in the store?

A Yes, sir.

Q Where was he sleeping at?

A In the chair where he always reads the paper at.

Q Did you wake him up?

A Well, you know, when I walked in, you know...he usually wakes up when someone walks in, you know. He jumps kinda. And he jumped up, you know, fixing to get my cigarettes. He asked me, said, "What you wanted?" And I told him and he jumped up and went for the cigarettes.

Q When did you pull your knife out?

A Right after...well, when I...I don't remember quite, but I looked at it... After I got in the store and when I retched (s at him, I remember seeing the hammer in his hand. I don't know where he got it from, you know, it happened so quick. I remember seeing the hammer and he was forcing me.

Q He was what?

A Forcing me, you know. When I touched him, he kinda, you know, just like he knowed what was happening or something, you know. And...

Q Why did you touch him?

A I don't know.

Q And he had the hammer in his hand?

A Not at first, but, after I touched him, he did.

Q After you touched him?

A Yes, sir.

Q With your knife?

A No, with my hand.

Q With your hand? Was he on the other side of the counter?

A Then he was, yes, sir.

Q And you reached over and touched him?

A Yes, sir.

Q You don't know why you reached over?

A No.

Q And he had the hammer in his hand?

A Not then.

Q Not then? When did he get the hammer?

A Right after I...well, when I touched him and then, you know, he looked at me. And then, when he turned around, you know, he had the hammer. I don't know where the hammer come from, off the counter or from where, you know. Then I just started stabbing him.

Q When did you pull the knife out?

A Right after he had the hammer, I saw the hammer.

Q Why did you pull the knife out?

A I don't know.

Q You stabbed him first when his back was away from you?
A Yes.
Q Huh?
A Yes.
Q So he was reaching for the cigarettes when you stabbed him in the back the first time?
A No.
Q When did you stab him in the back?
A When I touched him at first, I saw the hammer and his back was still turned.
Q His back was still turned?
A Right.
Q He wasn't facing you?
A No. Only, when he turned around, when I stabbed him, then he switched around and looked at me and he said something to me. And that's when I kept on.
Q You stabbed him in the back first and then he turned around, is that right?
A No. I didn't stab him in the back first. I grabbed him first.
Q You grabbed him first?
A Yes.
Q Where did you grab him?
A I touched him on the shoulder.
Q A minute ago you said you stabbed him in the back and

he turned around?

A No, I didn't say that. I said I touched him on the shoulder. Then I saw the hammer, and then, when I started stabbing him, his back was still turned. And then he started, you know, like he knowed...after I touched him, then he started.. he kept running back to the back and then I was still stabbing him. Then my knife broke and cut my hand. Then that's when the hammer fell out of his hand and I took it and hit him up side the head with it.

Q I show you State's Exhibit No. 11. Is that the knife blade or does it look like it? Does it?

A Yes.

Q Did he have the hammer in his hand when he was running back to the back of the store?

A Yes, sir.

Q I show you State's Exhibit No. 10. Is this the hammer?

A Yes.

Q Which side did you hit him on?

A I don't remember.

Q So it's your testimony that he woke up and you told him you wanted some cigarettes; he went up and got the cigarettes; at that time, you touched him and he had the hammer in his hand at that time?

A Not at that time.

Q Oh, he didn't?

A Not at that time.

Q Okay. When did he get the hammer?

A I don't know. I didn't see. I wasn't even aware of it, I'm telling you. All I know, he had the hammer. I saw the hammer but I didn't know where he got it from or what.

Q Was he facing you when you stabbed him the first time?

A No. He had his back to me.

Q Had his back to you. How many times did you stab him in the back? Do you remember?

A I don't know.

Q You don't know?

A No.

Q How many times did you stab him in the front?

A I don't know.

Q Did you follow him to the back of the store?

A I didn't... well, you know, it was... He didn't just go back there and fall. You know, all the while I was stabbing him, I was with him, you know.

Q The whole time he was going to the back of the store to the back door, you were right behind him stabbing him, wasn't you?

A Yes, sir.

Q And then, when he fell, you got the hammer and hit him in the head, didn't you?

A No. When he fell, I was still stabbing him.

Q When he fell, you were still stabbing him?

A Yes.

Q Then, after you finished stabbing him, you picked up the hammer and hit him?

A Yes.

Q This statement, which is marked as State's Exhibit No. 7, would you look at that, please?

A (Examining document)

Q Do you remember making that statement?

A Yes.

Q Is it true?

A Yes.

Q And correct?

A This part is true, but I mean...I said...I told them exactly what he put on here, but I didn't mean it right that way on the back.

Q On the back?

A Yes.

Q What are you referring to? Where it states the reason you did it was to get some money?

A Yes.

Q For a car? You didn't say that?

A I said it but I didn't mean to say it that way.

Q How did you say it?

A I can't remember how, you know, it was.

Q You can't remember what you said or how you meant it?

A Yes, sir.

Q How did you mean it?

A I don't know at that time.

Q You went up there to rob Mr. Turner --

A No.

Q -- and get that money to pay for a...to get a car, didn't you?

A No.

Q Did you leave the store with the hammer?

A Yes, sir.

Q Did you go up there to rob Mr. Turner?

A No.

Q Did you leave the store with this hammer?

A Yes.

Q And, when you left, you had it wrapped in your shirt, is that right?

A Yes.

Q Why did you do that?

A It was wrapped in the shirt, anyway, after I...You know, when I had the hammer...I still had the hammer and I got up. I don't know. I just didn't turn it loose. I just kept it. And then my hand...it got hooked up with my hand and I took and wrapped my hand up in my... The hammer was wrapped in my hand...was in my hand. I wrapped it up...wrapped my hand up where I cut it at,

and, you know, all at the same time, the knife... I mean the hammer was in my shirt, too, when I throwed it. I just shoved it off.

Q State's Exhibit No. 2 is the wallet you got from Mr. Turner?

A Yes.

Q How much money did you get out of it?

A I don't know. I didn't count it.

Q I show you what's been marked as State's Exhibit No. 5. Did you take any money out of that cash register?

A Yes.

Q You did?

A Yes.

Q Now, you say you went to the...somebody came up to the store and you went to the front door. Is that right?

A Yes.

Q Had you already stabbed and hit Mr. Turner over the head by that time?

A Yes.

Q And you told this individual that you had just...you said, "Damn. I just killed Mr. Turner?"

A (Nodded head affirmatively)

Q And you told that individual not to say anything, didn't you?

A Yes, because I was scared.

MR. TISE: No further questions, Your Honor.

THE COURT: You may come down, Mr. Smith.

(Witness dismissed)

THE COURT: Call your next witness.

MR. KEEBLE: The defense rests, Your Honor.

THE COURT: Very well. Let me see counsel up here.

(A conference was held between The Court and counsel at the Bench, as follows:)

THE COURT: Do you have any rebuttal testimony?

MR. TISE: No, sir.

THE COURT: I think what I will do, I will let the jury go to the jury room and I'll review this Unified Appeal matter with y'all.

MR. KEEBLE: Yes, sir.

THE COURT: Then we will go over the charge. Is that agreeable with you all?

MR. KEEBLE: Certainly, Your Honor.

THE COURT: Sheriff, I'm gonna let the jury go to the jury room and I'm gonna be back in Chambers going over the charges and the rest of this Unified Appeal, so you all can keep the defendant here or take him back over there if you want to. We'll be in recess for a while. Okay?

SHERIFF SMITH: Yes, sir.

MR. TISE: We'll need the defendant in Chambers to ask

APPENDIX F

CHARGE OF THE COURT

Ladies and gentlemen of the jury, you have been trying the case of the State of Georgia versus William Alvin Smith in Oglethorpe Superior Court, No. B-2540. This case arrived before you as the result of an indictment from the grand jury of this county. And this indictment in its material portion is, as follows. The first part lists the names of the grand jurors and then it says as to count one: "In the name and behalf of the citizens of Georgia, charge and accuse William Alvin Smith, hereinafter referred to as the accused, with the offense of murder, a felony, for that the said accused, on the 8th day of June, 1981, in the county aforesaid, did then and there unlawfully and with force and arms, and with malice aforethought, cause the death of Daniel Lee Turner, a human being, by subdural hematoma secondary to blunt force trauma to the head, contrary to the laws of said state, the good order, peace and dignity thereof." Count two: "And the grand jurors aforesaid, in the name and behalf of the citizens of Georgia, do further charge and accuse William Alvin Smith, hereinafter referred to as the accused, with the offense of armed robbery, a felony, for that the said accused, on the 8th day of June, 1981, in the county aforesaid did then and there unlawfully and with force and arms, with intent to commit a theft, take property of value, to wit, cash money property of Turner's Standard Service Station,

indictment

Lexington, Georgia, from the person and immediate presence of Daniel Lee Turner, by the use of an offensive weapon, to wit, a knife, contrary to the laws of said state, the good order, peace and dignity thereof."

Now, ladies and gentlemen of the jury, to this indictment the defendant, William Alvin Smith, has entered and filed his plea of not guilty. Neither this indictment, nor the defendant plea of not guilty,are evidence in this case and you are not to regard or consider it as such. Together, however , they form the issues which you are to determine. The defendant enters upon the trial of this case with the presumption of innocence in his favor, and that presumption remains with him throughout the trial until and unless the State carries the burden of proving the material allegations of this indictment beyond a reasonable doubt. The burden of proof never shifts to the defendant. In determining whether the State has carried this burden, you should consider all of the evidence which has been introduced here before you during this trial.

Now, I charge you, ladies and gentlemen of the jury, that not only is this indictment and the not guilty plea on it not evidence, neither is the statement and summation of counsel evidence, that is, the lawyers, and you will not consider that what they've said is evidence. Like this indictment and the plea of not guilty, this is the manner

in which the law gives to you to assist you in determining from the evidence what the true facts are in this case. And that is your job, to determine what the true facts are, as you apply the law that I give you in charge to those facts.

Now, ladies and gentlemen of the jury, I will define for you the phrase reasonable doubt. A reasonable doubt means exactly that. It is a doubt based on reason and for which a reason can be given. A reasonable doubt may arise through a consideration of the evidence, or because of a lack or insufficiency of the evidence.

I will now charge you and define for you some things that a reasonable doubt is not. A reasonable doubt is not a vague or conjectural doubt. It is not an imaginary doubt, or arbitrary doubt. It is not a capricious or fanciful doubt. Neither does it mean, ladies and gentlemen, a possibility that the defendant may be innocent, but it means a doubt for which you can assign a specific reason and a specific reason can be given.

Now, ladies and gentlemen, while the law requires the State to prove the defendant's guilt on each count beyond a reasonable doubt, yet, the law does not require the State to prove the defendant's guilt to an absolute or mathematical certainty. Moral and reasonable certainty is all that can be expected and all that is expected in a legal investigation such as this.

I charge you that in a criminal case like this the law makes you the judges of the facts and the law. The facts you obtain from the evidence produced to you throughout the trial. The law you obtain from The Court as I give it to you in charge. I instruct you that any verdict that you render in connection with this case now before you for determination should be arrived at from those facts and those facts only as you find them to be, and applying to those facts the law as I give it to you in charge.

Now, ladies and gentlemen, you are made by law also the exclusive judges of the credibility of the witnesses and the weight you shall give their testimony. And this applies to all the witnesses that came up and sat in the witness chair.

In determining their credibility, you may consider all of the facts and circumstances of the case. You may consider the witnesses' manner of testifying. You may consider their intelligence; you may consider their means and opportunity that they have of knowing the facts to which they testify, and the nature of the facts to which they testify; and the probability or improbability of their personal credibility insofar as the same may legitimately appear from the trial of this case before you.

The law also directs, ladies and gentlemen, that it shall be your duty to reconcile all conflicting testimony, if there is such in this case, whenever it can be done, so that all the

witnesses may be made to speak the truth and perjury imputed or attributed to none. But, if there is any testimony in th case which is in such irreconcilable conflict that this cannot be done, then it would be your duty to believe the evidence which seems most reasonable and believable to you considering all the facts and circumstances of this case.

Now, ladies and gentlemen of the jury, I charge you tha to impeach a witness is to show to the satisfaction of you, the jury, that such witness is unworthy of belief. A witness may be impeached by disproving the facts testified to by him or her, or by proof of contradictory statements previously made by that witness as to matters relating to his or her testimony and to the case. When a witness shall have been successfully contradicted as to a material matter, that witness's credibility as to other matters shall be for you, the jury, to determine. But, if a witness shall swear wilfull and knowingly false, you have the right, though not the duty, to reject this testimony in its entirety, unless you find th this testimony is corroborated by other impeached evidence. The credit to be given to a witness's testimony and whether or not an effort has been made to impeach a witness, and whether or not that effort was successful is a question that would be for you, the jury, to determine. In the final analysis, the weight and credit to be given any evidence is a question for you, the jury, to determine.

Now, ladies and gentlemen, I charge you that a crimina intent is a material and necessary ingredient in any crimina prosecution. I charge you that the acts of a person of soun mind and discretion may be inferred. But, in any event, the State has the burden of proving beyond a reasonable doub as I have defined for you, each and every material allegatio in both counts of the indictment.

I charge you further that a person will not be presumed to act with criminal intention, but you, the jury, may find such intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act or acts for which the accused in this case is prosecuted. You are the triers of the fact. Therefore,it is a question of fact solely for your determination as to whether or not there was a criminal intention on the part of the defendant, considering all the facts and circumstances, as disclosed by the evidence,and deductions which might reasonably be drawn from those facts and circumstances. While a criminal intent may be proven in more than one way, the question of whether the defendant did act with criminal intention is finally and always a question for you, the jury, to determine.

Now, ladies and gentlemen of the jury, evidence is basically of two kinds --direct evidence and indirect, or, as we sometimes call it, circumstantial evidence. Direct evidence

is that which immediately points to the question at issue. Indirect, or circumstantial evidence, is that which only tends to establish the issues by proof of various facts sustaining by their consistency the hypothesis or conclusion claimed.

Now, ladies and gentlemen of the jury, I charge you that, if circumstantial evidence is involved in this case, then you would consider the rule that each separate fact or issue linked to the chain of circumstances from which the deduction of guilt is sought to be drawn must be clearly proven beyond a reasonable doubt. A fact or circumstance not so clearly proven shall not be considered by you, the ju in the chain of circumstances, but should be rejected. The circumstances so proven must be a complete unbroken chain and must not only be consistent with the defendant's guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused.

Ladies and gentlemen, I charge you further that a crime in this state is a violation of a statute of this state in which there shall be a union or a joint operation of act or omission to act, and intention or criminal negligence.

Now, I charge you, ladies and gentlemen of the jury, that the law permits experts who have special training, knowledge and experience in certain lines to give their opinions as experts based upon their knowledge of particula

facts. The weight which is to be given the opinion of expert witnesses is for you to decide. You may accept it and act on it or reject it and act on your own judgment as you apply it to the evidence in this case.

Ladies and gentlemen of the jury, I charge you further that you may consider whether or not you will draw an inference of guilt from flight or similar acts if proven. Flight or similar acts, if any, is subject to explanation. You decide the weight to be given to it or whether to draw an inference of a consciousness of guilt or not. You decide if there was flight or similar act, and whether it was due to a sense of guilt or for other reasons. And, if for other reasons, no inference hurtful to the defendant should be drawn.

Now, ladies and gentlemen of the jury, I charge you further that an alleged statement by the defendant was admitted into evidence in writing. Before you may consider it as evidence for any purpose, you must first decide two questions as to the statement. First, was the defendant warned of his constitutional rights and did he clearly understand and knowingly give up such rights. And, secondly, was his statement clearly voluntary and freely and willingly given. The rights which must be explained and which must be understood and given up by the defendant before any statement is taken by the law enforcement officers are, as follows:

That he had a right to remain silent. That, if he chose not to remain silent, anything he said, wrote or signed could be used as evidence against him in court. That he had the right to consult a lawyer before any questioning and to have the lawyer present with him at all times during any questioning. And that, if he did not have money for a lawyer, a lawyer would be provided for him by the State to represent him before any questioning and to be present with him during any questioning.

I charge you that to be voluntary a statement must be freely and willingly given with the complete understanding and without threat or use of force, fear or injury, suggestion or promises of liency or reward. A statement induced by the slightest hope of benefit or remotest fear of injury is not voluntary. To be voluntary, a statement must be the product of a free will and not under any compulsion or any necessity imposed by others. The burden of proof is upon the State to establish that the warnings of all the rights mentioned were given, that they were clearly understood and knowingly given by the defendant, and that the statement was voluntary and freely and willingly made. If you find that all of the warnings as to his constitutional rights were given, that the defendant clearly understood the meaning of what was said, and knowingly gave up such rights; and, if you further find that the statement was voluntary, then

you will consider it as evidence and you will apply the general rules for testing the believability of witnesses and decide what weight, if any, you give to all or any part of such statement evidence. However, if you fail to find any one of the conditions which I have just described, you must disregard the statement entirely and give it no consideration in reaching your verdict. You should consider with great caution the evidence of any incriminatory statement by the defendant. In weighing such evidence, you should consider whether the statement was made by the defendant, whether it was truthful, whether it was accurately repeated and written, whether the defendant understood what was said, the circumstanc under which it was made, the emotions of hope or fear that may have existed. The jury may believe admissions or incriminatory statements in whole or in part, believing that which they find to be true, and rejecting that which they find to be untrue. Upon you alone, ladies and gentlemen of the jury, rests the duty to apply the general rules of testing the believability of witnesses, and to decide what weight should be given to all or any part of such evidence.

Now, ladies and gentlemen of the jury, I charge you that a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate, intentional, unlawfully to take away the life

of a fellow creature which is manifest by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

Count one of the indictment charges the offense of murder. I charge you that a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that of deliberate intention to take away the life of a fellow creature. Malice would be implied where no considerable provocation appears and all the circumstances of the killing show an abandoned and malignant heart. Legal malice is not necessarily ill will or hatred. It is the intention to unlawfully kill a human being without justification or mitigation, which intention, however, must exist at the time the killing is alleged, but it is not necessary for that intention to have existed for any length of time before the killing. In legal contemplation, a man may form the intention to kill a human being, do the killing instantly thereafter, and regret the deed as soon as it was done. In other words, murder is the intentional killing of a human being without justification or mitigation.

I charge you that, if you believe beyond a reasonable doubt that any time before this bill of indictment was returned and filed in this court by the grand jurors named

therein, that this defendant on trial did kill the person named in the indictment in the manner alleged, and that this killing was with malice aforethought, either express or implied; and further, that the intent to kill such a person was present as a necessary ingredient to such crime, then you would be authorized to find the defendant guilty of murder as charged.

On the other hand, if you have a reasonable doubt, as I have defined for you, as to the defendant's guilt of the offense of murder, then it would be your duty to give him the benefit of that reasonable doubt and acquit him insofar as the charge of murder is concerned.

I charge you, ladies and gentlemen, in regard to the count two of the indictment of armed robbery, the allegation of armed robbery. A person commits armed robbery when, with intent to commit a theft, he takes property of another from the person or the immediate presence of another by actual use of an offensive weapon. The essential elements of the offense that the State must prove beyond a reasonable doubt are, as follows: The taking must have been with a purpose to commit a theft. It must have been against the will of the person robbed, and it must have been by open, menacing immediate threat of or use of an offensive weapon. An offensive weapon is one which, if used in its usual accustomed manner, is likely to produce death. The character of a weapon as

such may be established by direct proof or by other evidence sufficient to establish it to be an offensive weapon. If you find and believe beyond a reasonable doubt that the defendant committed such offense, you would be authorized to find the defendant guilty of armed robbery.

Now, ladies and gentlemen of the jury, I charge you further the act itself may be so utterly senseless and abnormal to furnish satisfactory proof of a diseased mind. In determining the issue of sanity or insanity at the time of the act, the jury may consider the act and the mental condition of the accused as revealed by the evidence before and after the commission of the alleged offense, if any, and the declarations, if any, of the defendant, made at the time of the alleged offense or reasonably close thereto as proof of his mental condition at the time of such alleged crime. Opinion testimony relative to sanity or insanity, either layman or expert, is by no means conclusive upon this issue and is particularly dependant upon the facts or evidence supporting such opinions or evidence. The weight to be given such opinion is solely for you, the jury, to determine. Thus, if you find the defendant did not have reasonable sufficiency to distinguish between right and wrong because of mental disease, injury or congenital deficiency, and that he acted as he did because of delusional compulsion, as I have instructed you, at the time of the commission of

such alleged offense, that would be an end of your consideratio of this case and you would stop at that point and enter a verdict that would reflect your findings. And the form of that verdict would be, "We, the jury,find the defendant not guilty by reason of insanity."

Should this be your verdict, The Court charges you that the law of this state provides that it shall thereupon become the duty of the trial Judge to retain jurisdiction of the person and to order that person confined in a state hospital for the mentally ill. However, if, upon a considerati of the evidence, you determine that at the time and place of the occasions under investigations in this trial, that the defendant was sane and thus responsible, after you consider the evidence, in such event, you would proceed to consider the other portions of the charge that I have given you or will give you.

I charge you, ladies and gentlemen, that a conviction must not rest upon suspicion, conjecture or possibility of guilt where all the facts and circumstances of the case and all reasonable deductions therefrom present two theories, one of innocence and the other of guilt. And, if you, the jury, so find, then you would be authorized to acquit the defendant. On the other hand, should you find that the State has proven beyond a reasonable doubt every material allegation in the indictment on one and two, then, in such

event, you would be authorized and should convict the defendant.

Now, ladies and gentlemen of the jury, the ultimate question and the only question which The Court submits to you at this time is the question of defendant's guilt or innocence of the two crimes charged. You would not concern yourselves with any other question save that of the guilt or innocence of the defendant of the two offenses charged: Count one, murder; Count two, armed robbery.

Now, ladies and gentlemen of the jury, upon retiring to the jury room, you should select one of your number to act as foreman or forelady of the jury who will preside over your deliberations and who will sign the verdict to which all twelve of you must freely and voluntarily agree. Your initial conduct upon entering the jury room is a matter of importance. It is not wise to immediately express a determination or to insist on a certain verdict. If your sense of pride is aroused, you may hesitate to change your position later, even if you decide you were wrong. You consult with one another. Consider each other's views. But ultimately and finally each of you must decide this case for yourself. But you should do so only after a discussion and consideration of the case with your fellow jurors. Do not hestitate to change an opinion if convinced you were initally wrong. However, you should never surrender your honest conviction or opinion just to be congenial with your fellow jurors.

You make an individual decision, and then all twelve of you return a unanimous verdict back to this Court that speaks the truth in this case.

Now, ladies and gentlemen, I charge you further that if I, as Judge of this court, have said or done anything during the course of this trial which indicated to you that I had a desire or perference as to which of these parties should prevail, either the State or the defendant, I want you to completely disabuse your mind of that. I cannot have and I do not have a desire or a preference in this case as to which party should prevail. It is my duty to see that this trial is fairly presented to you according to the law and leave it to you ladies and gentlemen of the jury to reach a fair and true verdict that speaks the truth in this case. The purpose of this legal investigation, as is the purpose of all legal investigations, is to find the truth. And I charge you that you return a verdict in this case that speaks the truth, without fear, favor, affection, or sympathy in this case.

Now, ladies and gentlemen of the jury, I charge you further that you consider all the evidence in this case. Don't consider part of it. You consider it all, and you consider the charge of The Court as a whole -- all of it; don't pick out some part of it-- as to one body of law to which you are bound in this case. Any repetition that did occur

did not occur for the purpose of emphasizing one part of it over the other, but simply to present it to you in an orderly manner. So you consider all of The Court's charge to you and you find the facts from the evidence in this case, and you apply to those facts the law that I have just given you in charge and you return a verdict in this case back to The Court that speaks the truth.

The form of your verdict would be, in addition to the form that I've already suggested to you, as to Count one: "We, the jury, find the defendant..." and you put in guilty or not guilty "...of murder." Count two: "We, the jury, find the defendant guilty or not guilty of armed robbery." And you date it and have it signed by your foreman or forelady, as the case may be. With these instructions, now I will ask you to go to your jury room, but do not begin your deliberations. Just go in there and rest for just a minute. Don't begin your deliberations until I send word for you to start. Thank you. You may go to your jury room. The alternate will remain.

Everyone remain seated now. Everybody don't start scurrying around until the jury gets in the jury room.

(The jury retired to the jury room at this time -- 3:55 p.m.)

(The following transpired at the Bench outside the presence of the jury:)

MR. KEEBLE: The only thing, I think on the suggested

APPENDIX G

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

WILLIAM ALVIN SMITH.	:	
	:	
Petitioner,	:	
	:	
v.	:	
	:	
ROBERT O. FRANCIS,	:	Habeas Corpus No. _____
	:	
Warden, Georgia Diagnostic & Classification Center,	:	
	:	
Respondent.	:	

PETITION FOR WRIT OF HABEAS CORPUS

William Alvin Smith petitions this Court for a writ of habeas corpus pursuant to Ga. Code Ann. §50-127. In support of his petition he alleges the following:

1. The name and location of the court which entered the judgment of conviction under attack are:

Superior Court of Oglethorpe County,
Oglethorpe County, Georgia

2. The date of the judgment of conviction and sentence under attack is September 15, 1981.

3. The sentence under attack is that for the offense of murder petitioner be put to death by electrocution, and for the offense of armed robbery petitioner be imprisoned for life.

4. The nature of the offenses involved is that petitioner was convicted of one count of murder in violation of Ga. Code Ann. §26-1101 and one count of armed robbery in violation of Ga. Code Ann. §26-1902.

F. Denial of Due Process by the Establishment of a Conclusive Presumption of One Essential Element of the Offense of Murder
(Paragraphs 62-63)

62. The trial court's instructions to the jury concerning malice, given at the conclusion of the guilt-innocence phase of the trial, created a conclusive presumption of that essential element of the offense of murder, in violation of petitioner's right to require the State to prove beyond a reasonable doubt every element of the offense charged as guaranteed by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Facts Supporting Petitioner's Claim
That He Was Denied Due Process
By The Establishment Of A
Conclusive Presumption

63. On the essential element of malice, the trial court instructed petitioner's jury as follows:

> Now, ladies and gentlemen of the jury, I charge you that a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate, intentional, unlawfully [sic] to take away the life of a fellow creature which is manifest by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.
>
> Count one of the indictment charges the offense of murder. I charge you that a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that of deliberate intention

> to take away the life of a fellow creature. Malice would be implied where no considerable provocation appears and all the circumstances of the killing show an abandoned and malignant heart. Legal malice is not necessarily ill will or hatred. It is the intention to unlawfully kill a human being without justification or mitigation, which intention, however, must exist at the time the killing is alleged, but it is not necessary for that intention to have existed for any length of time before the killing. In legal contemplation, a man may form the intention to kill a human being, do the killing instantly thereafter, and regret the deed as soon as it was done. In other words, murder is the intentional killing of a human being without justification or mitigation.

(Tr. at 335-336; emphasis added.)

G. Admission of Irrelevant and Prejudicial Evidence During the Sentencing Phase of Petitioner's Trial (Paragraphs 64-68)

64. The admission of irrelevant, prejudicial testimony from the decedent's stepson during the sentencing phase of petitioner's trial, constituting nothing but a veiled appeal to passion, prejudice and other arbitrary and extraneous factors, violated petitioner's right to a fair and reliable capital sentencing hearing, as guaranteed by Sections 2-101, 2-111 and 2-114 of the Georgia Constitution and the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

Facts Supporting Petitioner's Claim That Irrelevant And Prejudical Evidence Was Admitted During The Sentencing Phase Of His Trial

65. The only evidence which the State presented during petitioner's sentencing hearing was the testimony

Facts Supporting Petitioner's Claim
That As Applied To Him The Section (b)(7)
Aggravating Circumstance Has Been
Construed In Unconstitutionally
Vague and Overbroad Fashion

84. Concerning the offense in this case, the evidence was clear that petitioner did not intentionally and gratuitously abuse the decedent before killing him; rather the decedent's injuries were inflicted during a brief struggle, and the decedent was rendered unconscious at the conclusion of that struggle.

85. Nothing in the facts of this case distinguishes the murder here, for purposes of applying the §(b)(7) aggravating circumstance, from the many kinds of murders which do not fall within the bounds of §(b)(7).

L. Cruel and Unusual Punishment
(Paragraphs 86-90)

86. The imposition of the death penalty on petitioner constitutes cruel and unusual punishment, in violation of petitioner's right to be free of such punishment under the Eighth and Fourteenth Amendments to the Constitution of the United States.

Facts Supporting Petitioner's Claim
That His Death Sentence Constitutes
Cruel and Unusual Punishment

87. Death is a disproportionately severe and therefore excessive punishment for a person, such as petitioner, who is a mental retardate with a mental age between ten and eleven years.

88. Application of the death penalty to persons as mentally retarded as petitioner is unjustified as a means of achieving any legitimate governmental end and is therefore excessive punishment.

89. Death is a disproportionately severe and therefore excessive punishment in petitioner's case, in view of the circumstances of the offense and petitioner's personal characteristics (including, but not limited to, his mental retardation).

90. The Georgia death penalty statutes, as interpreted and applied in general and in petitioner's case in particular, fail to assure consideration of mitigating circumstances by the sentencing body.

M. Denial of Constitutionally Required Appellate Review of the Death Sentence Imposed on Petitioner. (Paragraphs 91-97)

91. In its review on direct appeal of petitioner's death sentence, the Georgia Supreme Court deprived petitioner of the appellate review to which he was entitled by virtue of Ga. Code Ann. §27-2537(c)(3) and the Eighth and Fourteenth Amendments to the United States Constitution.

Facts Supporting Petitioner's Claim
That He Was Denied The Required
Appellate Review Of His Death Sentence

92. In its appellate review, the Georgia Supreme Court failed to consider or weigh mitigating factors, such as petitioner's mental retardation.

APPENDIX H

AFFIDAVIT OF DR. BRAD FISHER

I, BRAD FISHER, Ph.D., being first duly sworn, depose and say:

1. My name is Brad Fisher. I live at 108 Sidney Green Street in Chapel Hill, North Carolina. I am a licensed Ph.D. clinical-correctional psychologist. I am the Director of Fisher and Associates Research Center in Chapel Hill, which is involved in training and research primarily in areas involving the interrelationship between psychology and criminal justice. Since 1977, I have been teaching with appointments at both Duke University and the University of North Carolina. I have been asked by Stephen B. Bright and Stephen H. Glickman, attorneys for William Alvin Smith, to provide a comprehensive clinical evaluation of their client. In this affidavit, I will describe my qualifications, the manner in which the evaluation was conducted, and my findings.

2. My credentials include a Ph.D. received in 1976 from the University of Alabama, one of the two schools in the United States offering an American Psychological Association-approved clinical psychology program with a specialization in correctional work. This program was sponsored by the Law Enforcement Assistance Administration of the federal government, requiring 15 hours per week of work in correctional agencies throughout my training. In addition to this graduate degree, I received

my undergraduate training at Harvard University, from which I graduated cum laude with a thesis in corrections in 1972. I received a master's degree from Southern Illinois University with a thesis in correctional classification in 1973. Finally, I completed an internship that included work with the Ohio State Department of Corrections in their classification division. Since that time, I have worked as the assistant director of the Prison Classification Project, which worked to develop a statewide classification plan for the State of Alabama at the mandate of Judge Frank N. Johnson, and completed an evaluation with our staff of the 4,000 prisoners then in state correctional institutions in Alabama. Several of my publications from this time dealing with prisoner evaluation methods received national distribution and attention. I have also worked as the director of the maximum security juvenile institution in North Carolina (Dillon School), and as consultant to the National Institute of Corrections and the U.S. Department of Justice, as well as state and local agencies concerning methods for prisoner evaluation and correctional classification. My work in prisoner evaluation and classification has extended to approximately 30 states, and includes court testimony concerning these areas across the country over the last five years. Additionally, I have written numerous articles and books concerning the classification process, and methods for prisoner evaluation and the prediction of dangerous behavior (the subject of my Ph.D. dissertation). This has included the development of a model system for prisoner evaluation and reclassifi-

cation under a grant from the National Institute of Corrections, which involved an initial two-year full-time grant to write a report detailing these national guidelines, with the current third year being used in technical assistance towards guideline implementation in several states. Finally, I have been a member of the faculties of the University of North Carolina and Duke University, with classes, reports and presentations often specializing in these same areas. (See Vita attached hereto and incorporated herein by reference.)

3. I have performed evaluations and testified as an expert witness in a number of capital cases, including cases in North Carolina, Georgia, Florida, Mississippi, Louisiana, South Carolina, Arkansas, Nevada, and Virginia. In Georgia, these cases include State v. Richard Soto, State v. Marcus Riles, State v. William Anderson, State v. Gary Hawes, State v. Son Fleming, and State v. Andrew Legare. In addition, I performed an evaluation of nearly all Georgia prisoners on Death Row for the U.S. Justice Department in Daniels v. Zant. Furthermore, in Gutherie v. Evans I evaluated all protecive custody inmates at Reidsville, where mental retardation played a significant role in placement into protective custody. Several of the capital cases mentioned above have focused on the issues of mental retardation (i.e., North Carolina v. John Little) and how this condition relates to the various aspects of a capital case trial. I have testified with regard to questions of insanity, incompetence, ability to waive rights, and various

aspects of the makeup of the individual offender such as his developmental processes, the adequacy of social judgement and reasoning potential and other factors which may assist the court in understanding the reasons for the defendant's anti-social behavior and dealing with it.

Purpose of the Evaluation

4. The purpose of the examination was to provide a comprehensive clinical evaluation of William Alvin Smith. In particular, counsel asked whether there are aspects of William's development and character which might be considered potentially significant factors in mitigation on the question of the appropriateness of death as punishment for the murder in this case. Counsel asked me to decribe how I would explain William Smith's problems and limitations to a jury, and to provide them with an assessment of whether the testimony presented at William's trail was adequate to assist the jury in understanding William Smith in considering giving the death penalty. Counsel also asked for an assessment of whether William's mental limitations would affect his ability to understand his Miranda rights and make a knowing, voluntary and intelligent waiver of those rights.

Basis for the Evaluation

5. Preparation for the current evaluation statement is based on the following:

a. Client testing: An on-site testing session was conducted with William Smith on January 10, 1983. This included

tests in the intellectual, projective, and empirical personality inventory areas. These three areas provide the foundation for a comprehensive evaluation, with some areas of overlap for the purposes of reliability (i.e., measurement of level of intellectual functioning). They are generally described below:

(1) Intellectual: Tests in this area include IQ tests, and closely related evaluations of achievement in different school related areas, (i.e., mathematics, spelling, reading comprehension, and the like). These had been previously administered to William as early as 1973, and current findings varied very little from previous assessment conclusions.

(2) Projective: The purpose of these tests is to provide insight into indulging psychological processes (i.e, motivation styles, frustration tolerance, and unconscious processes) through analysis of responses to various ambiguous stands. These tests also provide further insight into limits and styles of intellectual processes (i.e., ability to use abstract rather than concrete cognition). For the current evaluation, the Thematic Apperception Test and the Rorschach test were utilized. The former employs drawing of persons and situations allowing multiple story interpretations (what is happening in the picture, who are the people, how do they feel, what will happen in the future). The latter employs inkblots for similar purposes with more vague stimuli.

(3) Empirical personality: Tests in this category (i.e., the partial Minnesota Multiphasic Personality Inventory) provide an assessment of personality characteristics from an acturial standpoint. Consequently these features (i.e., depression, anxiety, etc.) may be objec-

tively considered. This test also utilizes there validity scales, allowing the examiner to determine if manipulation or "conning" is present.

In addition, a clinical interview was conducted. Subsequent to this interview and testing, the results were scored and provide in part the foundation for the current evaluation findings. It should be noted that this session was conducted at the Georgia Diagnostic and Classification Center in Jackson.

b. An on-site evaluation of William Smith's home environment was conducted, including interviews with his father, an on-site evaluation of the father's work environment, an interview with the mother, and an interview with other siblings and peers in and around his actual home. These interviews and on-site home environment evaluations are a critical feature of the overall assessment. This is especially true in this case, where developmental aberrations and disturbances may play a major role in defining the client's current characterological make-up. In this case, where previous testing (including my own) suggested developmental deficiencies, this permitted a "real world" reliability check on these initial test perceptions through questions concerning his actual past functioning.

c. Testimony and related legal documents from William Smith's trial were reviewed, including:

(1) Testimony of Mr. Gay (high school principal);

(2) Testimony of Dr. Everett Kugler (the doctor giving previous testing, then superintendent of the Georgia Regional Hospital in Augusta);

(3) Testimony of William's mother, aunt and girlfriend at sentencing hearing;

(4) William's testimony;

(5) Testimony of the sheriff and deputy sheriff at the pre-trial hearing of September 1, 1981, describing the circumstances of William's waiver of his rights;

(6) The statement of rights and acknowledgement forms introducted at the motions hearing and/or the trial;

(7) Handwritten and typewritten copies of William's statement.

d. The evaluation also included a review of previous test data, including school records, intellectual testing, the Oglethorpe examination for achievement levels, the Wechsler Intelligence Scale for Children (WISC) given in 1973, and various other tests (House-Tree-Person test (HTP), and Metropolitan Achievement Test).

Findings

6. Narrative Overview Decription

William Smith is a 23-year old black male currently at the Georgia Diagnostic and Classification Center in Jackson. William was born and raised in the small town of Lexington, Georgia in Oglethorpe County. His mother and father are both hard-working and well respected members of this community. The father has worked at the same local Minit Serve Food Market job (day shift) for the last twenty years, and has held a second full-time job for a similar length of time as a maintenance operator at a local university. William has had problems with learning and retardation since an early age, with initial

special intellectual and achievement testing dating back to age 13 (1973). Initial recommendations for placement in educable mentally retarded (EMR) classes date back to the same time. These findings of retardation and developmental deficiencies are supported not only by this initial testing, but by descriptions given from his parents, peers, and siblings concerning his inability to function in the school setting. In addition, these interviews, as well as the testing, gave further demonstrations of features in his character often associated with retardation. These include strong dependency features, the expected tendency to be frustrated by more than the non-retarded person, the inability to properly vent this frustration, and impaired social judgment.

7. Current Offense Interview Findings

It should be noted at the outset that the current interview required a very careful and slow process of questioning. William Smith was quite willing to respond to all questions, yet these had to be given in very simple form to avoid the frustration and concomitant anxiety and confusion that often results from a normally paced interview. With this backdrop, the following features seem especially noteworthy in his description of situational components in the days surrounding the commission of the crime. First, it should be pointed out that one of the most important people in William's life at this time was his girlfriend. He described her as the first person near his own age who had really cared about him, and this had taken

on extraordinary importance in his life. With this in mind, the fact that he had broken up with his girlfriend in the two days previous to the crime appears significant. His own description of this event included his feelings of total frustration and confusion over what to do about the breakup.

A second factor revolves around the destruction of William's car the day before the crime. This automobile was his first material possession of consequence, and a major feature relating to his self-esteem and feelings of self-worth. It should be noted that at the time the car was destroyed he did not have a license, and the car was not paid for. This served to further heighten his level of frustration and resultant confusion because of his inability to deal with that frustration. Still another issue in this area is that the day before the crime he was stopped by the deputy sheriff who, although he knew that William did not have an operator's license, did not take him in.

If one was to rank the two most important things in William Smith's life, these would probably have been his girlfriend and his car. To have both of these taken away at the same time would have been traumatic for anyone; however, with his primary psychological dynamics including major limitations in his ability to deal with frustration, as well as easily formed frustration and confusion over typical life experiences not confusing to those not mentally retarded, these events take on special significance. For a person with William's level of

retardation, it is important to have a simple, straightforward, and consistent foundation upon which to operate. In his case, the two critical ingredients of this somewhat shaky foundation had been removed, which brought into play the limitations connected with his retardation, much more than would have been the case for a person with normal intellectual functioning, frustration tolerance, and ability to not become confused by outside stimuli.

8. Intellectual Test Findings

The findings of this evaluator demonstrated a full-scale IQ of 65. This was further supported by material obtained in the visual motor Gestalt test (Bender), as well as by the type of stories given and responses to stimuli in projective testing (in these latter areas, he was never able to move from totally concrete and specific answers into any kind of abstraction). It is important to note that the findings of the current evaluation are totally consistent with the previous findings of evaluations of William Smith in school and before trial (i.e., with an IQ falling within the 65-70 full-scale range). In addition, the current findings are consistent with the previous achievement scores, demonstrating that William Smith falls an average of five years below grade level at a minimum in all subjects. These findings indicate that William does indeed fall within this mental retardation range. This is further supported by both my tests and previous tests, indicating consistent

achievement scores (i.e., in mathematics, spelling, reading, and the like) several years below his age level. For example, it is interesting to note that on the Oglethorpe examination given in 1974, it was noted that William had achieved only one of the 40 objectives. This is consistent with the current findings, and is also reflected in achievement scores varying between 2.0 (reading) and 4.1 (language expression). The presence of this level of mental retardation indicates much more than just slow learning; it indicates impaired social judgment, impaired ability to understand or acknowledge the consequences of behavior, impaired ability to make rational judgments, increased dependency features, susceptibility to confusion and anxiety in stressful situations, tendency toward more impulsive behavior (this often based on the condition in which the retarded person has more frequent frustrations with the many situations that are confusing and complex to him or her, without the ability to appropriately vent that frustration) and some diminished capacity to distinguish between right and wrong. This latter category is different from an inability to distinguish between right and wrong that may be the case where the insanity issue is involved.

Although there have been consistent and pervasive findings of mental deficiency since William Smith was initially diagnosed and tested in 1973, it is also important to reflect on other areas where testing did not reveal significant mental

disturbance. In this category, I would note that my tests did not reveal the presence of significant organicity, or a psychotic process. A finding in either of these would have been critical if insanity had been the most appropriate defense; however, this condition did not exist for this client, and consequently this approach would not have been appropriate.

Finally, it should be noted that my clinical interview with William suggested extreme difficulties in comprehension and ability to follow my questions, which is consistent with his serious level of retardation. This was further reinforced by my interview with his mother, father, and siblings, who indicated that this had been his nature since childhood. They all noted that instructions and tasks that could be given just once to one of the other children would have to be given slowly and several times in William's case.

9. Significance of the Findings

a. In the first place, it should be noted that mental retardation is a condition having frequently profound, yet somewhat complicated effects on a person's character, behavior, and overall adaptation to his environment. At the same time, this is paralleled with a frequent misunderstanding of these effects of retardation on a client by lay personnel, and extending to juries and legal personnel in the current case. By this, I am referring to the frequent misperception that retardation is only "slow learning" and nothing more. Because of

this, there is a strong need for the professional to give an explanation to jury members or others involved in the evaluation of the extent and ramifications of the retardation in the individual case being considered. This is essential in cases such as this where a significant degree of retardation is involved, because of these major effects in critical areas (i.e., ability to know the difference between right and wrong, other social judgment areas, the ability to appreciate the significance of one's acts, the ability to aid an attorney in one's defense, Miranda issues, and the like).

b. Both in cases where I have performed evaluations and in research concerning other testimony in capital cases, mental retardation and related limitations are important mitigating features. For example, post-trial interviews have been conducted in a number of cases with this conclusion on the part of the jury, as well as results of the evaluation that I performed in John Wilson's case in North Carolina.

c. The characteristics that are often coupled with retardation, and which are present in the case of William Smith, are critical in understanding his behavior in commiting the offense currently under consideration and in making the decision between life and death. There are several component features here, including his increased capacity to be frustrated, coupled with his decreased ability to handle that frustration in appropriate ways, his dependency features in relation to the giving of a confession to a police officer whom

he knew well (i.e., perceiving him as an authority figure for whom he should do anything requested), and similar aspects of his character that demonstrate that he should not be held to the same standards as others because of these limitations beyond his control. In addition, other important factors, such as his potential for prison adjustment, have not previously been considered in this case although there is sufficient data for meaningful professional comments and predictions in this area.

d. Because of his extreme difficulties in comprehension and communication described in the foregoing section, William Smith operated at a substantial disadvantage in court, especially in testifying in his own behalf. My research in this area discloses that other disturbances, such as the psychopathic personality, are much more able to defend themselves through being able to understand issues concerning their own presentation, appearance, and the like in presenting their case, as well as their ability to be less quickly confused or intimidated by the courtroom process. However, in the case of retarded defendants, the person is much more likely to become confused and intimidated by the courtroom process and to have no way to vent this frustration in the process I noted in the paragraphs above. Consequently, inappropriate responses, such as withdrawal or angry acting-out, may be the result. In addition, the retardate will have much less ability to understand or communicate with the attorneys concerning his own testimony, with difficulty in communication causing him to be

perceived as unwilling, rather than unable, to communicate with the jury while on the stand. This is cetainly supported in the current case, where my interview with William Smith in the Jackson Diagnostic Center had to be conducted extremely slowly and carefully, with several breaks given so that the confusion of my questioning did not frustrate him and cause him to withdraw or to become totally disoriented. In this instance, it is also important to note that during my interview he demonstrated considerable remorse, both in his clinical responses to my questions and in his responses to the projective materials. This is important because it is quite possible that the deficiencies I have noted which would have made it difficult for him to appear as his own witness would also have resulted in an inability to show any remorse in a situation as complex (and consequently frustration-provoking for him) as the courtroom process. In previous cases in which I have participated or researched, this inability to communicate, combined with a low level of frustration tolerance and communication difficulties, has often been misunderstood as recalcitrance, lack of remorse, and similar inappropriate behavior by a jury when given only a momentary and superficial glimpse of the defendant, without a proper explanation of the clinical condition (in this case, retardation).

e. At William Smith's trial, only the insanity and competence questions were touched on at all, and then quite briefly and inadequately. It is absolutely inappropriate to

look at the serious mental limitations (retardation) that have been documented for William Smith since 1973, and limit their importance to the question of whether he knew the difference between right and wrong. In this particular case, there appears to be undebated information dating back to his childhood of significant retardation and developmental problems that relate in a much more pervasive and undeniable way to issues of mitigation and waiver of Miranda rights that were not even considered in the trial.

The most striking feature of the testimony in the original case was that this undebated retardation was not connected to the social problems and deficiencies I have described for the purposes of the jury's understanding of the importance of these limitations in William Smith's case. Whereas the presence of psychosis and the extent to which it affects many critical areas of affect and intellectual functioning is generally widely debated, the effect of this level of retardation in the areas I have described is well accepted and documented in most introductory texts on this topic. If the IQ had been substantially higher (i.e., 80 or above), it could have been argued that the issue was just "slow learning," or that he was affected by cultural deprivation, rather than a serious level of retardation affecting judgment and awareness areas. However, this simply is not the case in the current situation.

The lack of attention to these critical deficiencies can be explained in part by one inaccuracy in the testimony at

trial. Dr. Kuglar properly notes William's IQ category (Full Scale 65), yet suggests that 10% of the population falls within this category. In fact, the book written by the developer of the Wechsler Intelligence Test states that only 2.2% of the population falls in the 65 or below category. (Wechsler's Measurement and Appraisal of Adult Intelligence, 5th ed., 1970, p. 125.) This point is also important because of the previous testimony by the school principal (Mr. Gay), in which he implies to the jury that William would have have been appropriate for placement in the class for educable mentally retarded students because of the changes in EMR cutoff scores. The more recent testing by Dr. Kugler (mirrored by my own findings) indicates an IQ of approximately 65, which is below both the new and the old cutoff scores, and consequently refutes Mr. Gay's contention. However, this point appears to have been lost to the jury. It should be noted in this context that Dr. Kuglar was never asked to explain what an IQ is, what it measures, what average scores mean, or the other data critical to giving someone a sense of the meaning of a particular IQ or achievement score.

The lack of attention to these deficiencies can also be attributed to the fact that the only issues considered at the trial were insanity and competency. Since William Alvin Smith was competent to stand trial and not insane at the time of the offense, limiting the testimony to these questions prevented the jury from hearing about the other limitations I have

described and which have consistently been found regarding William Smith.

f. Waiver of Miranda Rights

The following assessment is based on the standard that a person needs to understand his rights and make a knowing and intelligent relinquishment of those rights and privileges in giving a valid confession. I have subdivided my comments into general comments about William's mental limitations relating to these standards, with a second section detailing situational components at the time of the crime that may have affected his ability to understand his rights and properly relinquish them during his confession.

i. Overview of Mental Limitations Relating to Waiver of Rights

Both the current testing by this evaluator and the testing dating back to 1973 demonstrate the overall functioning in the retarded range (Full Scale 65-70). In addition, current and previous testing indicates exceptionally low achievement scores, typically falling several years below expectations for William's age level. Within this analysis of achievement capabilities, it is specifically important to note that his reading and English abilities were especially low. This includes information from tests dating back to 1978 (9th grade), in which he scored in the first percentile in reading (where 99 out of 100 would do better than he did), and in the second percentile in English (where 98 out of 100 would do better than he did). With this in mind, it is probable that his ability to comprehend the advice he received concerning his

rights was insufficient. In particular, I would note that the statement of rights includes language such as "consult with lawyer" (#3) and "absolute right" (#5). In addition, in his acknowledgement and waiver of rights, the language includes "no persuasion or coercion" where the same question concerning his ability to understand this language is appropriate.

Finally, it is important to note that his achievement deficits are not limited to reading and English abilities, but relate to an overall retardation that also affects areas of verbal comprehension, memory, reasoning abilities, and similar skills that would be essential for making a realistic acknowledgement and waiver of his rights, and in properly giving a statement. I have discussed in some detail earlier in this affidavit the current psychological evaluation reflecting these deficits as found in the intellectual testing and corroborated by aspects of the projective testing, the clinical interview with William Smith, and interviews concerning his past behavior and development from his family and peers in his home environment. When this is put together with the previous testing dating back to 1973 and 1974 demonstrating these deficiencies, the question concerning his ability to comprehend the advice he received about his rights, as well as his ability to understand the significance of waiving his rights, is certainly in doubt.

In addition to the general comments above concerning William's overall limitations and their effect on his understanding the waiver of rights, there are several situational components of the process resulting in his statement that raise

further questions in these areas. These are discussed below.

ii. Situational Components

The current evaluation has several times noted the dominance of dependency features in the character of William Alvin Smith. These dependency features leave him looking for sources of guidance and direction, especially at times when he is frustrated and consequently confused and disoriented. The situation at the time of his arrest provided just these circumstances, with the addition of the presence of an officer familiar to him from childhood as the source of guidance and direction. The general situation at the time of his arrest was late at night (nearly midnight), and that he was in a state of hunger and exhaustion (transcript, p. 88). At this point his already extreme confusion, disorientation, and need for direction, were further exacerbated by his placement away from the local county jail in a jail located in another county. From here he was placed in a private cell and kept totally incommunicado for the next 12 hours. During this time, it is my opinion that his confusion, disorientation, and need for direction were even further accentuated by the fact that he spent this time alone without any information at all relating to his status. Finally, William was given food and at the same time presented to Sheriff Gene Smith, whom he had known since childhood. From a behavioral scientist's point of view, this sets up nearly a total situation where the dependency could be expected to be funneled toward this authority feature, where William Smith would have done everything he could do to try and please this single source of reinforcement and guidance, in the midst of nearly total confusion, isolation, and deterioration.

iii. Summary of Miranda Issues

Based on the above general statement concerning his limitations, coupled with specific situational components relating to these limitations, it is my opinion that William's confession was extracted without a valid, knowing, voluntary and intelligent waiver of his rights. This opinion is based on the fact that his mental retardation did not permit him to understand either his rights or the significance of the waiver of these rights. In addition, his exhaustion at the time of his arrest, coupled with transport to a non-local jail, subsequent 12 hours of isolation, and final introduction to an officer who had known him since childhood (calling him "Noodle" in the transcript), resulted in a situation where William Smith would have gone to great lengths to accommodate this officer. His confusion and deterioration had been maximized at this point, and the dependency features were at a peak when Sheriff Smith arrived. This is not the kind of situation that would have permitted an intelligent waiver of his rights, or permit understanding of his rights before giving a statement.

FURTHER AFFIANT SAYETH NOT.

Brad Fisher
BRAD FISHER, Ph.D.

Subscribed and sworn to before me this the 28th day of March, 1983. Witness my hand and notarial seal.

Robert G Morris
Notary Public
Notary Public, Georgia, State at Large
My Commission Expires Dec. 15, 1985

CURRICULUM VITAE

NAME: R. Brad Fisher

ADDRESS: 108 Sidney Green Street
Chapel Hill, NC 27514
Home (919) 929-0191
Office (919) 968-4931

EDUCATION:

B.A. Psychology, Harvard University, Cum Laude, Cambridge, Massachusetts, 1972;
Thesis: Juvenile Community Corrections in Massachusetts

M.S. Psychology (Clinical Program), Southern Illinois University, Edwardsville, Illinois, 1973
Thesis: Differences in motivational factors among two classifications of delinquents.

Ph.D. Psychology (Correctional-Clinical Program) APA
University of Alabama, 1976
Predictions of dangerousness for delinquents in relation to quantity of data, authoritarianism, and dogmatism (Stan Brodsky, chairman)

Internship Ohio State University Hospitals and Ohio Department of Corrections - APA Program (Adolescent specialization)

PROFESSIONAL EXPERIENCE:

Director, Fisher and Associates Research Center, Chapel Hill, North Carolina. Administration of grants and contracts for training and research primarily in areas interfacing psychology and criminal justice. Examples of sponsors include U. S. Department of Justice, North Carolina Administrative Office of the Courts, and the National Institute of Mental Health. 1979 - present.

Director of Clinical Services, to Acting Director and Consultant, Dillon Youth Center, Butner, North Carolina. Research and clinical services for unit with 100 residents, including both emotional and behavioral disturbances. Fall, 1977 to present.

Assistant Professor of Psychology, University of North Carolina. 1977 - present.

Assistant Professor of Psychology, University of Alabama, 1976-77.

Assistant Director, Prison Classification Project. Research and psychological assessment of Alabama's prison population directed by the University of Alabama's Psychology Department. 1976-77.

Associate Editor, Law and Psychology Review, University of Alabama. November, 1973 - August, 1975.

EXAMPLES OF TEACHING EXPERIENCE:

Adolescent Psychology, University of North Carolina.

Personality, University of North Carolina.

Law and Psychology, with Stan Brodsky, University of Alabama, 1976.

Introductory Helping Skills, University of Alabama, 1977 (a course emphasizing video-tape feedback for skill development).

Audio-Visual Media in Psychology Research and Instruction, University of Alabama, 1976-77.

Introductory Psychology, University of Alabama, 1974-76.

Group Processes, Southern Illinois University, 1973.

Treatment issues for the violent adolescent. Two-day workshop series for accreditation to North Carolina juvenile judges. Asheville, Greensboro, and Durham, NC, 1981.

Serious juvenile offenders. Three-day workshop series to North Carolina court counselors. Asheville, Greensboro, Durham, Greenville, NC, 1980-81.

EXAMPLES OF RESEARCH EXPERIENCE:

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Fisher, B. Fences. AACP Newsletter, December, 1977.

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Fisher, B. and Rogers, B. Motivational factors for two juvenile diagnostic categories. Phillips Brooks House, Harvard University, 8, 1, June, 1972.

Melvin, K. B., Fisher, B., and Corse, S. The Chalkville Institution for Girls: A demographic study. Continuing Education Center, University of Alabama, 20, June, 1975.

CONVENTION PRESENTATIONS AND WORKSHOPS:

Fisher, B., and Varley, W. Behavior management with the aggressive adolescent. National Conference on the Aggressive Adolescent, Duke University, October 30, 1981.

Fisher, B. Effects of overcrowding in prison. Presentation to North Carolina Council on Alternatives to Incarceration, Chapel Hill, NC, October 14, 1981.

Fisher, B. and Fidler, D. Dealing with extreme stress in teenagers. Videotape and lecture to the North Carolina Council of Family and Marriage Therapists. Boone, NC, September 1981.

Harris, H. and Fisher, B. Treatment issues for the violent adolescent. Two-day workshop series for accreditation to North Carolina juvenile judges. Asheville, Greensboro, and Durham, NC, 1981.

Fisher, B. The importance of milieu in treatment of the aggressive adolescent. Presentation to Wright School, May 12, 1981.

Fisher, B. Serious juvenile offenders. Three-day workshop series to North Carolina court counselors. Asheville, Greensboro, Durham, Greenville NC, 1980-81.

Fisher, B. Behavioral management of the violent adolescent. Presentation at conference dealing with the serious juvenile offender. The Institute of Government, Chapel Hill, NC, October 13, 1980.

Harris, H. and Fisher, B. Developmental concepts for normal and abnormal adolescence. Presentation to the Federal Correctional Institution, Butner, NC, September 28, 1980.

Harris, H. and Fisher, B. Screening, evaluation, and referral for disturbed youth. Presentation to Conference on Adolescence by the Administrative Office of the Courts, Asheville, NC, July 14, 1980.

Fisher, B. Changing perspectives in dealing with disturbed youth. Presentation to Memphis State University Conference on Adolescent Development. Memphis, April 22, 1980.

Fisher, B. The prediction of violence. Presentation to Annual Meeting of Florida District Judges, February 31, 1980.

Fisher, B. The uses of video-tape in psychological research and instruction. Two-day workshop for psychology students, University of North Carolina at Chapel Hill, July 14 and 15, 1979.

Fisher, B. Changing trends in adolescent violence. Capital Health Systems Conference on Adolescent Issues in North Carolina, Raleigh, June 10, 1979.

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Fowler, R. D., and Fisher, B. Academia in community application. A video-tape and slide presentation presented at a Florida State University symposium, Tallahassee, April, 1977.

Fowler, R. D., Brodsky, S. and Fisher, B. The prison classification experience: Psychology at the interface of law and corrections. Paper and slide presentation at the Psychology Speaker Series, University, Alabama, March, 1977.

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Prentice-Dunn, S. and Fisher, B. Graduated guidance with retarded children. A video-tape presented at the Partlow State School, February, 1977. Library catalog J-67-71.

Fisher, B. The applications of the MMPI to an adolescent population. Paper presented to the Ohio State University, Department of Psychiatry-Grand Rounds, Columbus, Ohio, December, 1975.

Fisher, B. Art therapy utilization with an in-patient child population. Paper and slide presentation delivered to the Department of Child Psychiatry, Ohio State University Hospitals, Columbus, Ohio, October, 1975.

RESEARCH AND TRAINING VIDEOTAPES:

The following is a list of video-tapes used for training in the North Carolina Department of Psychiatry under the overall direction of Dr. Donald Fidler. Although developed primarily for training at the University of North Carolina School of Medicine, they have been distributed for training elsewhere by the Health Science Consortium and are produced by the Medical Sciences Teaching Laboratories in Chapel Hill.

Gretel: Issues for Psychotherapy: Training and description of critical stages and components of psychotherapy. One hour, color, 3/4" cassette, 1981.

Moonstones: Dramatic presentation of issues encountered by the psychiatric resident in dealing with a serious adolescent offender. One hour and thirty minutes, color, 3/4" cassette, 1981.

Evaluation and commitment: For training in cases involving involuntary commitment. 20 minutes, color, 3/4" cassette, 1980.

Hypnosis: Training tape in issues for hypnosis in psychiatric training, including historical perspective. 30 minutes, color, 3/4" cassette, 1980.

The Mental Status Interview: Presentation of actual cases carrying different DSM III diagnoses. Adult patients from Dorothea Dix Hospital, adolescent patients from Dillon School. Each case approximately 20 minutes, color, 3/4" cassette. 1980.

Minotaur: Training tape for issues related to the violent patient. 55 minutes, color, 3/4" cassette, 1979.

Dobro: Presentation of case involving neurological impairment in an adolescent. 22 minutes, color, 3/4" cassette, 1979.

PROFESSIONAL AND JOURNAL AFFILIATIONS:

Center for Early Adolescence, Chapel Hill, NC (fellow) 1978 - present
Capitol Health System's Advisory Council; Task Force on Juvenile Justice (member) 1978-80.
N.C. Council of Child Psychiatry, Task Force on the Aggressive Adolescent (member)
Adolescent Day Treatment Program; Community Guidance Clinic, Duke University (advisory board member)
Orange County Youth Task Force (member)
Article Review Editor, Criminal Justice and Behavior, 1976 - present.
American Psychological Association (member)
American Association of Correctional Psychologists (member)

Southeastern Psychological Association (member)
North Carolina Psychological Association (member)
American Association for Educational Media Specialists (member)

EXAMPLES OF EXPERT WITNESS TESTIMONY
AND EVALUATION:

1981:

Centerino v. Wilson, C.A. C80-0545-L(J) (W.D. Ky.). Evaluation concerning effects of classification and overcrowding in Kentucky women's prison system.

Chapman v. Clark, C.A. 79-3192 (D.C. N.J.). Evaluation concerning classification and effects of overcrowding in Jersey City Jail.

Duran v. Apodaca. Ongoing evaluation for U.S. Department of Justice, National Institute of Corrections, and revision of state classification processes pursuant to consent decree entered 8/1/80. (1980-present)

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Florida v. Valle. Evaluation and testimony concerning prison adjustment and violence potential, Miami.

Grigsby v. Arkansas, PB-C-78-32 (E.D. Ark.). Court testimony and report concerning possible jury selection bias in capital case process, Little Rock (1979-81).

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1980:

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North Carolina v. Cherry. Evaluation and testimony concerning prison adjustment.

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1979:

Arkansas v. Little, PB-C-78-32 (E.D. Ark.). Report concerning competency and danger potential of juvenile.

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Florida v. Knight. Testimony and report concerning prison adjustment potential for clemency hearing.

Georgia v. Jordan. Evaluation report of effects of prison conditions as mitigating circumstance in this capital case involving prisoners' rights.

Georgia v. Lemley. Testimony concerning classification recommendations and future prison adjustment potential.

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EDITOR'S NOTE

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NO. 84-6780

Supreme Court, U.S.
FILED
JUN 24 1985
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WILLIAM ALVIN SMITH,

Petitioner,

v.

ROBERT O. FRANCIS, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General
Counsel of Record for
the Respondent

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

DENNIS R. DUNN
Staff Assistant
Attorney General

Please Serve:

WILLIAM B. HILL, JR.
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3359

QUESTIONS PRESENTED

I.

Whether this Court should grant a writ of certiorari to examine an Eighth Amendment claim not addressed on its merits either by the Supreme Court of Georgia or by the state habeas corpus court?

II.

Whether this Court should grant a writ of certiorari to determine whether a definitional charge regarding "implied malice," in relation to circumstantial evidence, was unconstitutionally burden-shifting, where both the Supreme Court of Georgia and the state habeas corpus court rejected the Petitioner's claim?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 1

REASONS FOR NOT GRANTING THE WRIT 4

I. THE STATE HABEAS CORPUS COURT PROPERLY CONCLUDED THAT PETITIONER'S EIGHTH AMENDMENT CLAIM THAT HIS DEATH SENTENCE WAS DISPROPORTIONATE WAS WITHOUT MERIT BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND..... 4

II. THE TRIAL COURT'S DEFINITION TO THE JURY OF "IMPLIED MALICE," IN RELATION TO THE CIRCUMSTANTIAL EVIDENCE AT TRIAL, WAS NOT CONSTITUTIONAL..... 7

CONCLUSION 11

CERTIFICATE OF SERVICE 12

TABLE OF AUTHORITIES

Page(s)

Cupp v. Naughten, 414 U.S. 141 (1973).....8

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NO. 84-6780

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WILLIAM ALVIN SMITH,

Petitioner,

v.

ROBERT O. FRANCIS, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, William Alvin Smith, was convicted in the Superior Court of Oglethorpe County, Georgia, on September 15, 1981, for the malice murder and armed robbery of Daniel Lee Turner. At the sentencing phase of Petitioner's trial, the jury recommended a sentence of death after finding the seventh statutory aggravated circumstance as defined by O.C.G.A. § 17-10-30 (b)(7); Ga. Code Ann. § 7-25-34.1 (b)(7). The Petitioner was thereafter sentenced to death for the murder of Daniel Lee Turner, and to life imprisonment for the offense of armed robbery.

The Petitioner appealed his conviction and sentence to the Supreme Court of Georgia, which reviewed the case and affirmed the Petitioner's convictions and sentences. Smith v. State, 249 Ga. 228, 290 S.E.2d 43 (1982). Petitioner's application for a writ of certiorari from this Court, as well as his

petition for rehearing in this Court, was denied. Smith v. Georgia, 459 U.S. 882, rhng. denied, 459 U.S. 1060 (1982).

Petitioner subsequently filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia, alleging, among other allegations, that the trial court's instructions on malice were impermissibly burden-shifting and that the sentence of death imposed in this case was disproportionately severe and excessive because of the Petitioner's alleged mental condition. On April 16, 1984, the Superior Court of Butts County denied the petition for habeas corpus relief finding that the trial court's instructions on malice were not either unconstitutional or in contravention of state law, and that the state habeas corpus court was precluded from reviewing the Petitioner's claims of disproportionality because this issue had been previously decided by the Supreme Court of Georgia on direct appeal.

On August 9, 1984, the Supreme Court of Georgia granted the Petitioner an application for a certificate of probable cause to appeal the decision of the state habeas corpus court. The Petitioner's case was docketed, briefs were submited for both parties and oral argument was presented. On January 29, 1985, the Supreme Court of Georgia affirmed the decision of state habeas corpus court. Smith v. Francis, 253 Ga. 782, 325 S.E.2d 362 (1985). The Supreme Court of Georgia addressed itself to the Petitioner's claims regarding the alleged ineffectiveness of his trial attorney and to the trial court's instructions to the jury on mitigating evidence during the sentencing phase of the trial. Id. at 782-87. The Supreme Court of Georgia did not specifically address either issue raised in the instant petition for certiorari, but instead stated:

> The order entered by the habeas court dicusses each of the remaining issues raised by Smith. We affirm the conclusion of that court that none of them merit relief.

Id. at 787(3).

Petitioner now seeks a writ of certiorari from this Court to review that affirmance of the state habeas corpus court's decision.

Further facts may be developed herein as necessary for a more thorough illumination of the issues presented to this Court for resolution.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE STATE HABEAS CORPUS COURT PROPERLY CONCLUDED THAT PETITIONER'S EIGHTH AMENDMENT CLAIM THAT HIS DEATH SENTENCE WAS DISPROPORTIONATE WAS WITHOUT MERIT BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

The Petitioner contends in the first ground of his petition that the infliction of capital punishment on a mentally retarded offender is unconstitutional. Respondent submits that this allegation was not addressed by the courts below, but was instead found to be without merit based upon an independent and adequate state law ground.

In paragraphs 86-90 of the state habeas corpus petition, the Petitioner alleged that his death sentence was disproportionately severe and therefore was excessive punishment because the Petitioner was allegedly a mental retardate. The state habeas corpus court did not address the merits of this claim. Instead, the state habeas corpus court found that the Supreme Court of Georgia had previously conducted a review of the Petitioner's death sentence on direct appeal, and found the sentence not excessive or disproportionate. See state habeas corpus court order, page 29. See also Smith v. State, 249 Ga. at 235. As the state habeas corpus court found that the Supreme Court of Georgia had already reviewed this issue during the Petitioner's direct appeal, the state habeas corpus court held that this prior review was binding for the purposes of the habeas corpus action. See Habeas corpus order, page 29.

On its review of the state habeas corpus court order, the Supreme Court of Georgia affirmed without opinion this conclusion by the lower court. Smith v. Francis, 253 Ga. at 787(3).

Under Georgia law, issues covered on direct appeal are not cognizable in a state habeas corpus proceeding. After an appellate review has been conducted, the same issue will not be reviewed again in any proceeding on a writ of habeas corpus in state court. Treadwell v. Hopper, 235 Ga. 241, 219 S.E.2d 155 (1975); Elrod v. Ault, 231 Ga. 750, 204 S.E.2d 176 (1974).

The decision sought to be reviewed then in the instant case is the state habeas corpus court's holding that it was precluded from reviewing the Petitioner's claims on the merits. This decision by the state habeas corpus court was based purely upon an interpretation of state law. This Court has long declined to review state court judgments based on adequate and independent state grounds, as long as there is no discrimination merely because a federal question is involved. Henry v. Mississippi, 379 U.S. 443 (1965); Herb v. Pitcairn, 324 U.S. 117, 118 (1944). The adequate state ground in the instant case is the state procedural requirement prohibiting a state habeas corpus court from addressing issues already decided on direct appeal. The state ground relied upon in the instant case clearly serves a legitamate state interest by establishing the finality of an appellate court decision. As this requirement does not discriminate on the grounds that a federal question has been raised, the decision of the state habeas corpus court properly relied on an adequate and independent state ground.

Petitioner has inappropriately raised the issue of alleged disproportionality in the instant case. This issue would have been more properly raised in the Petitioner's first petition for certiorari to this Court upon the affirmance of his conviction and sentence by the Supreme Court of Georgia in 1982. The only decision presented to this Court for review in the instant case is whether or not the state habeas corpus court properly declined to review the merits of the Petitioner's claims based upon state procedural law. The Petitioner has failed to show that the disposition of any

federal question in the instant case was necessary to the decision of the state habeas corpus court, and therefore Respondent urges this Court to decline to consider this issue. Stembridge v. Georgia, 343 U.S. 541, 547 (1952).

II. THE TRIAL COURT'S DEFINITION TO THE JURY OF "IMPLIED MALICE," IN RELATION TO THE CIRCUMSTANTIAL EVIDENCE AT TRIAL, WAS NOT UNCONSTITUTIONAL.

The Petitioner contends that the trial court's definition of "implied malice" was unconstitutionally burden-shifting. Respondent submits that the charge in the instant case was not burden-shifting, but instead was merely the definition of implied malice as it related to circumstantial evidence presented at trial.

At the Petitioner's trial, the trial court defined "malice" as follows:

> I charge you that a person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that of deliberate intention to take away the life of a fellow creature. Malice would be implied where no considerable provocation appears and all the circumstances of the killing show an abandoned and malignant heart. Legal malice is not necessarily ill will or hatred. It is the intention to unlawfully kill a human being without justification or mitigation, which intention, however, must exist at the time the killing is alleged, but it is not necessary for that intention to have existed for any length of time before the killing.

(T. 336).

The state habeas corpus court recognized that any single instruction to the jury may not be judged in isolation, but must be viewed in the context of the overall charge, in

accordance with Cupp v. Naughten, 414 U.S. 141 (1973). Therefore, the state habeas corpus court did not limit its review of the trial court's charge merely to the portion challenged by the Petitioner in paragraphs 62 and 63 of the habeas corpus petition, but instead reviewed the trial court's entire charge to the jury. (See Habeas corpus order, page 24). After making this review, the state court found no violation of the Petitioner's constitutional rights and no conclusive presumption presented by the charge. Id. at 24-25. Instead, the habeas corpus court noted:

> [T]he trial court appears to have been very careful to convey to the jury that the State was required to prove each individual element of each crime beyond a reasonable doubt. (Cites omitted). It does not appear to this Court that any reasonable juror would infer a burden on Petitioner to prove a lack of malice given the trial court's instructions as a whole.

Id. at 25.

In reviewing this decision by the state habeas corpus court, the Supreme Court of Georgia affirmed the lower court holding without any elaboration. Smith v. Francis, 253 Ga. at 787(3).

The Supreme Court of Georgia had already reviewed this identical allegation, as well as the "burden-shifting" claim based on Sandstrom v. Montana, 442 U.S. 510 (1979), in the case of Walden v. State, 251 Ga. 505, 506(1), 307 S.E.2d 474 (1983). As noted by the Supreme Court of Georgia in Walden, the charge in question does not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt. Instead the charge leaves the jury free to credit or reject the inference and does not shift the burden of proof. Id. Citing,

Stephens v. State, 247 Ga. 698, 706, 278 S.E.2d 398 (1981), cert. denied, ___ U.S. __, 103 S. Ct. 3551 (1981); Tucker v. State, 245 Ga. 68, 70, 263 S.E.2d 109, cert. denied, 449 U.S. 891 (1980).

As the habeas corpus court also noted, this identical charge has been reviewed by the United States Court of Appeals for the Eleventh Circuit, and has been found constitutional. Lamb v. Jernigan, 683 F.2d 1332, 1340 (11th Cir. 1982), cert. denied, 460 U.S. 1024 (1983). The Court of Appeals noted that the charge in the instant case was not burden-shifting, and was instead really a directive to the jury that the finding of malice must often be based entirely on circumstantial evidence, that is that the jury was not entitled to refuse to find malice soley because direct evidence of malicious intent is lacking. Id. The Court of Appeals found that the instructions did not expressly relieve the prosecution of proving circumstances that indicate malice nor did it reduce such burden to something less than beyond a reasonable doubt. Id. Though the instruction in isolation did not seem precise or clear, in view of the trial court's instructions on circumstantial evidence, the Court of Appeals found that no reasonable juror would have interpreted the charge in question as changing the reasonable-doubt burden of proof, which the jurors were instructed the prosecution had to meet. Id.

The Eleventh Circuit recently reiterated its position in Lamb and concluded that viewing the instructions of the Court as a whole, reasonable jurors would not interpret the charge on implied malice as burden-shifting. See Jarrell v. Balkcom, 735 F.2d 1242, 1256 (11th Cir. 1984).

Respondent submits that the state habeas corpus court, the Supreme Court of Georgia and the United States Court of Appeals for the Eleventh Circuit have correctly interpreted the instant charge on implied malice and have correctly concluded that it is not unconstitutionally burden-shifting under the guidelines of Sandstrom v. Montana, supra.

As in Lamb, the trial court here had given an extensive charge to the jury regarding circumstantial evidence. (T. 331). This was followed by the trial court's definition of both express and implied malice, which is the portion of the charge challenged in the instant case. Given the correct interpretation of the law as noted above, the trial court's instructions in the instant case were not unconstitutionally burden-shifting. Accordingly, the Petitioner has failed to establish any merit to this claim in the instant case.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia, as it is manifest that there is no federal question for review by this Court as to the Petitioner's claims, and further, there is no substantial federal question not previously decided by this Court. Additionally, the decision sought to be reviewed is demonstrably in accord with the applicable decisions with this Court.

Respectfully submitted,

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General
Counsel of Record for Respondent

MICHAEL J. BOWERS 071650
Attorney General

JAMES P. GOOGE, JR. 300555
Executive Assistant Attorney General

MARION O. GORDON 302300
First Assistant Attorney General

DENNIS R. DUNN 234098
Staff Assistant Attorney General

Please serve:

DENNIS R. DUNN
132 State Judicial Building
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3499

CERTIFICATE OF SERVICE

I, WILLIAM B. HILL, JR., a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent hereby certify that, in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of same in the United States mail with the proper address and adequate postage to:

Stephen H. Glickman
Zuckerman, Spaeder, Moore, Taylor & Kolker
1201 Connecticut Avenue S.E.
Washington, D.C. 30026

Stephen B. Bright
600 Healey Bldg.
57 Forsyth Street, N.W.
Atlanta, Georgia 30303

This 21st day of June, 1985.

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

EDITOR'S NOTE

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No. 84-6780

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

WILLIAM ALVIN SMITH,

Petitioner

-against-

ROBERT O. FRANCIS, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

STEPHEN H. GLICKMAN
Counsel of Record
ZUCKERMAN, SPAEDER, MOORE
TAYLOR & KOLKER
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036
202/775-1440

Counsel for Petitioner

Of Counsel:

STEPHEN B. BRIGHT
600 Healey Building
57 Forysth Street, N.W.
Atlanta, Georgia 30303
404/688-1202

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TABLE OF CONTENTS

		Page
TABLE OF CONTENTS		i
TABLE OF AUTHORITIES		ii
ARGUMENT		1
I.	The Decision Below on Petitioner's Eighth Amendment Claim Does Not Rest on an Adequate and Independent State Ground	1
II.	Respondent's Arguments in Support of the Jury Instructions Regarding Malice and Intent Were Squarely Rejected by this Court in Francis v. Franklin	8
CONCLUSION		9
CERTIFICATE OF SERVICE		9

TABLE OF AUTHORITIES

Cases — Page

Barr v. City of Columbia, 378 U.S. 146 (1964).....6

Berryhill v. Ricketts, 242 Ga. 447, 249 S.E.2d 197 (1978).....6

Berryhill v. State, 235 Ga. 549, 221 S.E.2d 185 (1975).....7

Francis v. Franklin, 471 U.S. ____, 105 S.Ct. ____, 85 L.Ed.2d 344 (1985).....8, 9

Hathorn v. Lovorn, 457 U.S. 255 (1982).....2, 6

Henry v. Mississippi, 379 U.S. 443 (1965).....7

Lawrence v. State Tax Commission, 286 U.S. 276 (1932).....7

Michigan v. Long, ____ U.S. ____, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).....5

Minnesota v. National Tea Co., 309 U.S. 551 (1940).....5

Reece v. Georgia, 350 U.S. 85 (1955).....2

Smith v. Francis, 253 Ga. 782, 325 S.E.2d 362 (1985).....4, 6

Smith v. State, 249 Ga. 228, 290 S.E.2d 43 (1982).....2, 6

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VIII.....passim

No. 84-6730

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

WILLIAM ALVIN SMITH,

Petitioner

-against-

ROBERT O. FRANCIS, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

ARGUMENT

I. The Decision Below on Petitioner's Eighth Amendment Claim Does Not Rest on an Adequate and Independent State Ground.

Respondent does not deny that petitioner's cruel and unusual punishment claim presents an unresolved federal question of fundamental importance. Respondent argues, however, that the decision below on this claim rests on an adequate and independent state ground. According to respondent, the Georgia Supreme Court denied the claim pursuant to a state procedural rule that issues reviewed on direct appeal will not be reviewed again in state habeas corpus proceedings.

Even on its own terms, respondent's argument is fatally flawed by the concession that petitioner's claim was rejected on its merits at an earlier stage of this litigation. For as this Court has said, "It has long been established, however, that '[w]e have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of [state proceedings], . . . and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case. . . .'" Hathorn v. Lovorn, 457 U.S. 255, 261 (1982), citing Reece v. Georgia, 350 U.S. 85, 87 (1955).

More important, the Georgia Supreme Court almost certainly did not deny petitioner's claim in the habeas corpus appeal on the procedural ground that respondent cites. To the contrary, it is virtually certain that the court below reached the merits of that claim. For on direct appeal from his conviction, petitioner did not raise his current claim that it is cruel and unusual punishment to inflict the death penalty on a mentally retarded offender for an unpremeditated homicide.[1/] Quite understandably, therefore, the Georgia Supreme Court did not review that claim when it decided the appeal.[2/] The court did review petitioner's death sentence, as

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1/ See the Brief on Behalf of Appellant filed on petitioner's behalf in his direct appeal to the Georgia Supreme Court, reproduced in Appendix A to this Reply.

2/ The opinion of the Georgia Supreme Court affirming petitioner's conviction, Smith v. State, 249 Ga. 228, 290 S.E.2d 43 (1982), is reproduced in Appendix B to this Reply.

it routinely does in all capital cases, and it did conclude that the sentence was "not excessive or disproportionate to the penalty imposed in similar cases," 249 Ga. at 235, 290 S.E.2d at 48-49. This conclusion was not, however, based on any evaluation whatsoever of the Eighth Amendment significance of petitioner's mental retardation. The court's opinion therefore cannot reasonably be read to encompass a review of the cruel and unusual punishment claim that petitioner subsequently advanced.[3/]

Petitioner raised that claim for the first time in the habeas corpus proceeding before the Superior Court of Butts County, Georgia.[4/] (Under Georgia law at the time, petitioner was entitled to raise issues in habeas corpus that had not been specifically preserved in the underlying proceeding.) Respondent contested the claim on its merits, and without suggesting that it had already been decided on direct appeal.[5/] Similarly, in the habeas corpus appeal, petitioner continued to focus on the merits of his cruel and unusual

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3/ Thus, respondent's suggestion, at page 5 of his Brief in Opposition to the Petition for a Writ of Certiorari, that "[t]his issue would have been more properly raised in the Petitioner's first petition for certiorari to this Court upon the affirmance of his conviction and sentence by the Supreme Court of Georgia in 1982" is absolutely untenable in light of this history.

4/ Appendix G to the Petition for a Writ of Certiorari contains the section of the habeas corpus petition in which the cruel and unusual punishment claim first appeared. In addition, petitioner devoted a substantial portion of his post-hearing brief in the Superior Court to that claim. See pages 69-83 of Petitioner's Memorandum of Law in Support of Petition for a Writ of Habeas Corpus, reproduced in Appendix C to this Reply.

5/ See pages 18-19 of the Post-Hearing Brief on Behalf of the Respondent, reproduced in Appendix D to this Reply.

punishment claim[6], and respondent continued to answer it solely on the merits, without invoking any procedural bar to review.[7]

The Superior Court denied the Eighth Amendment claim on the ground that the Georgia Supreme Court had "already concluded that Petitioner's death sentence is not excessive or disproportionate."[8] Respondent construes this to mean that the Superior Court declined to reach the issue on the merits because of an adequate and independent state procedural ground. In affirming, however, the Georgia Supreme Court merely upheld without explanation the "conclusion" that this issue, among others, did not "merit relief." Smith v. Francis, 253 Ga. 782, 787, 325 S.E.2d 362, 366 (1985). The court did not explicitly adopt the Superior Court's reasoning, nor did it otherwise advert to any procedural bar to review of the issue on the merits.

Since on direct appeal the Georgia Supreme Court clearly did not review petitioner's Eighth Amendment claim, it is highly implausible that in the habeas corpus appeal the same court held the claim unreviewable on the patently erroneous ground that such prior review had taken place before it. This is particularly implausible given that respondent did not ask the court to so

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6/ See pages 31-45 of petitioner's Application for Certificate of Probable Cause, reproduced in Appendix E to this Reply, and pages 14-15 of the Brief for Appellant, reproduced in Appendix F to this Reply.

7/ See pages 8-9 of the Brief on Behalf of the Appellee by the Attorney General, reproduced in Appendix G to this Reply.

8/ Order at 29, reproduced in Appendix B to the Petition for a Writ of Certiorari.

hold, but instead addressed petitioner's claim on the merits.[9/] By far the only reasonable explanation of the concededly cryptic language of its opinion is that the Georgia Supreme Court rejected the cruel and unusual punishment claim on the merits, and not because of any obviously inapplicable state law procedural bar.

Since the decision below on petitioner's claim does not clearly and unambiguously rest on an adequate and independent state law ground, what this Court said in Michigan v. Long, ____ U.S. ____, 103 S.Ct. 3469, 77 L.Ed. 2d 1201 (1983), disposes of respondent's contention:

> Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

103 S.Ct. at 3476 (emphasis added). "[A]mbiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940).

9/ The implausibility is only heightened further by the fact, which we discuss infra, that the court below did address on the merits another of petitioner's claims which clearly was reviewed previously on direct appeal. In doing so, moreover, the court did not discuss any procedural barriers to review.

Furthermore, respondent's state procedural "rule" would not constitute an adequate and independent state ground even if it could somehow be demonstrated that the Georgia Supreme Court did rely on it. A state procedural ground is not adequate when the procedural rule is not "strictly or regularly followed." Barr v. City of Columbia, 378 U.S. 146, 149 (1964). "State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply even handedly to all similar claims." Hathorn v. Lovorn, 457 U.S. at 263. That the Georgia Supreme Court does not consistently apply the procedural rule cited by respondent was demonstrated in that court's opinions in this very case.

On direct appeal from his conviction, petitioner challenged the constitutional adequacy of the trial court's jury instructions on mitigating circumstances,[10/] and the Georgia Supreme Court upheld those instructions on the merits. Smith v. State, 249 Ga. at 22, 290 S.E.2d at 44-45. In his habeas appeal, petitioner again challenged the same instructions on the same grounds. Although the court even cited its earlier discussion, it nonetheless addressed the issue again on the merits. Smith v. Francis, 325 S.E.2d at 364-366. The Georgia Supreme Court made no reference to any rule barring consideration of an issue already reviewed on direct appeal.

Nor was this an isolated instance of a departure from the "rule." For example, in Berryhill v. Ricketts, 242 Ga. 447, 249 S.E.2d 197 (1978), a habeas corpus appeal, the Georgia Supreme

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10/ See Appendix A to this Reply.

Court considered on their merits two issues -- concerning a restriction on the timing of an opening statement, and the admission of an incriminating statement elicited by the police in the absence of counsel -- that it had concededly already reviewed on direct appeal.[11/] Again, the court did not cite, let alone invoke, any procedural bar to the reconsideration of these issues.

To be adequate, a state procedural rule must not only be consistently applied, it must also be fairly applied. "Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not thus be avoided. ...[C]onstitutional rights [may be] denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it." Lawrence v. State Tax Commission, 286 U.S. 276, 282 (1932). The state procedural rule thus must be "a reasonable one and clearly announced to defendant and counsel." Henry v. Mississippi, 379 U.S. 443, 448 n.3 (1965). These criteria were clearly violated if a rule precluding consideration of issues previously reviewed on direct appeal was unpredictably applied to petitioner's Eighth Amendment issue, which was indisputably not reviewed on direct appeal.

It is no doubt unfortunate that both the Superior Court and the Georgia Supreme Court saw fit to deny petitioner's cruel and unusual punishment claim without discussing its merits. Those courts'

11/ See Berryhill v. State, 235 Ga. 549, 221 S.E.2d 185 (1975).

evasion of a serious Constitutional question, properly raised and pressed by petitioner, was not justified by any legitimate state procedural rule. The manner in which the court below ruled on the question therefore cannot be used to bar this Court's review.

II. Respondent's Arguments in Support of the Jury Instructions Regarding Malice and Intent Were Squarely Rejected by this Court in Francis v. Franklin.

Respondent argues that the Superior Court, the Georgia Supreme Court and the Eleventh Circuit Court of Appeals have all interpreted the challenged malice and intent instructions in this case to be, at least in context, nothing more than "a directive to the jury that the finding of malice must often be based entirely on circumstantial evidence, that is that the jury was not entitled to refuse to find malice solely because direct evidence of malicious intent is lacking."[12/] In making this argument, respondent simply ignores this Court's recent decision in Francis v. Franklin, 471 U.S. ___, 105 S.Ct. ____, 85 L.Ed.2d 344 (1985). "The question ... is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning." 85 L.Ed.2d at 354.

As in Franklin, here too "[t]he challenged sentences are cast in the language of command." Id. For example, the trial court instructed petitioner's jury that "[m]alice shall be implied." (T.T. at 336; emphasis added.) Respondent contends that other portions of the charge transformed the impact of this language so

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12/ Brief in Opposition for the Respondent at 9.

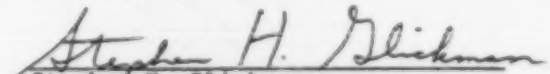
that it merely created a permissive inference. Yet respondent is able to specify no language in the rest of the charge that could have had this effect. It is now settled that general instructions concerning the state's burden of proof, the presumption of innocence, and the evaluation of circumstantial evidence do not save a charge which also contains unconstitutional burden-shifting language. Franklin, 85 L.Ed.2d at 356-360.

In short, the decision below upholding the jury charge on malice and intent at petitioner's trial is irreconcilable with Franklin. Respondent does not argue that the error was harmless, nor was it.[13/] Particularly since petitioner's life is what is at stake, the patent error should be corrected.

CONCLUSION

Petitioner respectfully submits that this Court should issue the requested writ of certiorari to decide both questions presented by his Petition.

Respectfully submitted,



Stephen H. Glickman
Zuckerman, Spaeder, Moore,
Taylor & Kolker
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036
202/775-1440
Counsel for Petitioner

Of Counsel:

STEPHEN B. BRIGHT
600 Healey Building
57 Forysth Street, N.W.
Atlanta, Georgia 30303

13/ See the Petition for a Writ of Certiorari at 20-21.

APPENDIX A

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to 1

IN THE SUPREME COURT

OF THE STATE OF GEORGIA

ORIGINAL

CASE NO. 38247

WILLIAM ALVIN SMITH,

Appellant

-vs-

STATE OF GEORGIA,

Appellee

BRIEF ON BEHALF OF APPELLANT

FLOYD W. KEEBLE, JR.
Attorney for Appellant

315 Bond Street
Royston, Georgia 30662
Phone: 404/245-5088

IN THE SUPREME COURT OF

THE STATE OF GEORGIA

WILLIAM ALVIN SMITH,	)	
	)	
Appellant	)	CASE NO. 38247
	)	
-v-	)	
	)	
STATE OF GEORGIA,	)	
	)	
Appellee	)	

BRIEF ON BEHALF OF APPELLANT

PART I

STATEMENT OF FACTS

William Alvin Smith, the Appellant, was indicted by the Oglethorpe County Grand Jury for the June 8, 1981 murder and armed robbery of Mr. Dan Turner at his grocery store in Lexington, Georgia (R.3). He entered his plea of not guilty on September 1, 1981 (R.62) and was tried by a jury in Oglethorpe County on the 14th and 15th day of September, 1981 and found guilty as to both counts. The jury imposed the death penalty after a finding of the aggravating circumstances that the murder was outrageously and wantonly vile, horrible and inhumane in that the murder involved torture, depravity of mind and aggravated battery to the victim (T.383-384,R.145). The Trial Judge sentenced the Appellant to life for armed robbery by order dated September 15, 1981 (R.146) and sentenced him to

death for murder by order dated September 16, 1981 (R.143-144).

Mr. Daniel Lee Turner was found lying unconscious in his place of business on the morning of June 8, 1981, suffering from numerous stab wounds and blunt traumas to his head (T.197,242). The Appellant was not questioned at the time of his arrest, but was transported to the Clarke County Jail where he was interviewed the following day by Sheriff Gene Smith and a deputy (T.223). The Appellant gave a statement which was reduced to writing and signed by him (T.231,Exhibit No. 7). The Appellant in his statement admitted the assault and robbery.

Two witnesses testified as to Appellant's presence at the scene of the crime. John Collins stated that he saw the Appellant leave the victim's store moments before the victim was found (T.158). He observed that the Appellant did not have a shirt on (T.159). Mr. Willie D. Robertson who had known Appellant all his life went to the store that morning and saw the Appellant in the doorway. Mr. Robertson testified that the Appellant stated words to the effect that, "Damn, I have killed Mr. Dan" and told the witness not to say anything about it (T.165). The witness observed a hammer in Appellant's hand (T.166) and he appeared nervous (T.167). The witness reported the incident directly to the Sheriff's office (T.168). The Appellant left on foot (T.158).

The victim's wallet (T.191), a knife blade (T.200), a hammer, and Appellant's shirt were recovered the same day (T.236-237).

Dr. Dawson of the Georgia Crime Laboratory who performed an autopsy on the victim testified as to his findings. His examination revealed sixteen stab wounds to the body, three of which penetrated into the plural cavity, and two or three distinct blows to the head, causing intercranial hemorrhage. He was of the opinion that Mr. Turner died as a result of a subdural hematoma secondary to blunt force trauma to his head (T.242-246) and that all the wounds were inflicted while the victim was alive (T.247). Mr. Turner died later that evening (T.269).

When the Appellant was arrested on the evening of the incident, he was cooperative and offered no resistance (T.188).

The Appellant's former teacher and assistant principal, Mr. Merrill Gay, testified for the defense. The Appellant was placed in special educational classes, Educable Mentally Retarded, until he dropped out of school at the end of his eighth year. The determining factor used by the school system is an individual's I.Q. score (T.273).

Dr. Everett Clark Kuglar, Superintendent of Georgia Regional Hospital at Augusta, examined and tested the Appellant as to his mental condition. The test was administered in two sections to determine his mental level. He scored a 71 I.Q. as to his verbal skills and a 61 I.Q. as to performance skills for a full-scale score of 65, which the doctor explained as

mildly retarded (T.280). He stated that this individual would test somewhere between ten and eleven as a mental age (T.281). On cross-examination the doctor was of the opinion that the Appellant was able to determine right from wrong at the time of his evaluation (T.283).

The Appellant took the witness stand to testify in his own defense after having been advised of his constitutional right not to do so. He stated that he first went to an aunt's house and then to the home of a friend that morning (T.285). He was walking and decided to go to Mr. Turner's store for some cigarettes (T.286). When Mr. Turner turned for the cigarettes, the Appellant reached for him. "You know, when he retched at the cigarettes, I retched at him, you know, just... Then he, you know, had the hammer and, when he grabbed that hammer, you know, he started forcing his self, you know, and I got carried away" [quote] (T.287). He admitted the stabbing and hitting him with the hammer after Mr. Turner dropped it (T.287). He went back in the store after confronting Mr. Robertson [a witness] and took money from the person of Mr. Turner and the cash register and started running (T.288). He denied that he had any intentions of robbing (T.289) and did not intend to kill Mr. Turner and later cried (T.290).

The jury found William Alvin Smith guilty as to both counts on September 15, 1981 (R.142).

In the penalty phase of the trial family members and a friend testified as to his unusual behavior shortly before the incident.

His mother testified that he appeared strange and acted bizarre a day or two before the incident (T.351). His aunt and girlfriend both testified that he was talking strange and was not himself (T.358,359).

The jury, after the charge by the Court, found the written aggravating circumstances supplied to them and returned the death penalty.

Additional facts and references to the transcript will be supplied in Part III of this brief whenever necessary to adequately address any issue raised in this Appeal.

IN THE SUPREME COURT

OF THE STATE OF GEORGIA

WILLIAM ALVIN SMITH,	)	
	)	
Appellant	)	CASE NO. 38247
	)	
-v-	)	
	)	
STATE OF GEORGIA,	)	
	)	
Appellee	)	

ENUMERATION OF ERRORS

PART II

Now comes William Alvin Smith, defendant in the Lower Court, and files this his Enumeration of Errors as follows:

-1-

The Court erred in admitting certain photographs into evidence over objection (T.396, 397, Exhibits 8 and 9).

-2-

The Court erred in failing to define the term of mitigating circumstances.

-3-

The Court erred in failing to specify the mitigating circumstances offered by the Appellant and also providing same in written form for the jury to consider during their deliberation in the penalty phase of the trial.

-4-

The sentence was imposed under the influence of passion,

prejudice, and other arbitrary factors.

-5-

The Court erred by instructing the jury to disregard Appellant's mother's emotional plea for her son's life during the penalty phase of the trial (T.356).

-6-

The Court erred in failing to declare and squash the Georgia Death Statute providing for the imposition of the death penalty (R.138).

-7-

The Court erred in failing to declare the Georgia Unified Appeal unconstitutional (R.138).

The Supreme Court of the State of Georgia has jurisdiction as to this Appeal by reason of the fact that the Appellant herein was convicted of murder and sentenced to death by a jury. This is one of those cases specifically enumerated in Ga. Code Ann. §2-3704 as being within the exclusive jurisdiction of the Supreme Court of Georgia.

PART III

ARGUMENT AND CITATION OF AUTHORITY

ENUMERATION NO. 1. THE COURT ERRED IN ADMITTING CERTAIN PHOTOGRAPHS INTO EVIDENCE OVER OBJECTION.

Appellant recognizes Georgia's liberal policy toward the admission of photographic evidence and should be admitted if relevant, unless it is unnecessarily prejudicial to the Appellant and results in a violation of due process.

Exhibits 8 and 9 consisted of photographs taken of the victim at the hospital after surgery and are produced on pages 396 and 397 of the Transcript. These photographs vividly show large amounts of blood and the body in a contorted position were introduced solely for the purpose of inflaming the minds of the jurors against the Appellant. See Florence v. State, 243 Ga. 738, 741(4), (n.1) 256 S.E. 2d 467 (1979).

Dr. Dawson stated that he had an opinion as to the cause of death and described the physical trauma in detail given to the body (T.242-246). The photographs would merely be cumulative to the testimony of other witnesses. These photographs of the victim are spectacularly gruesome and do not indicate the cause of death. They only depicted massive hemorrhaging about the head and stab wounds to the body.

Defendant shows that the outrageous and horrible portrayal of the victim in the photographs did so inflame and

prejudice the minds of the jurors against the Appellant that he was denied an impartial and fair trial and the due process of law.

Appellant would further submit that the cause of death is not a question for laymen in this case, but rather a matter for a trained medical doctor, and yet by allowing these photographs to be introduced into evidence, the jury was given the opportunity to make a decision as to a point in which they had no training, special knowledge, or expertise.

ENUMERATION NO. 2. THE COURT ERRED IN FAILING TO DEFINE THE TERM OF MITIGATING CIRCUMSTANCES.

In the penalty phase of the trial the court instructed the jury as to aggravating circumstances, in that the offense of murder was outrageously or wantonly vile, horrible, or inhumane, in that it involved torture, depravity of mind, or an aggravated battery to the victim.

Further in the charge the Court instructed the jury that mitigating circumstances are those circumstances which in fairness and mercy shall be considered in fixing the punishment. However, the Court failed to instruct the jury as to the definition of mitigation. The Appellant contends that the undue emphasis in the charge as to aggravating circumstance and the limited and naked charge as to mitigating circumstances denied the Appellant a fair trial and due process of law.

ENUMERATION NO. 3. THE COURT ERRED IN FAILING TO SPECIFY THE

MITIGATING CIRCUMSTANCES OFFERED BY THE APPELLANT AND ALSO PROVIDING SAME IN WRITTEN FORM FOR THE JURY TO CONSIDER DURING THEIR DELIBERATION IN THE PENALTY PHASE OF THE TRIAL.

The Court erred in failing to specify to the jury the specific mitigating circumstances that the Appellant contends exist in this case. By failing to so charge the jury undue emphasis was given to the specific aggravating circumstances contended and asserted by the State.

The Court provided to the jury, as provided by statute, with a written instruction as to the aggravating circumstance asserted by the State. The Court did not provide the jury with a written form as to mitigating circumstances.

The law of this State prohibits an alleged confession of a Defendant to be taken into the jury room during the jurors deliberation. The reason given by the Courts for this rule is that such confessions would be given "to much weight".

The Appellant submits that the same affect occurs in the present situation where written instructions as to aggravating circumstances are allowed to be submitted to the jury during their deliberation and no written instruction as to mitigating circumstances is provided for the jury's consideration and deliberation. This violates the Appellant's right to a fair and impartial trial and due process of law.

ENUMERATION NO. 4. THE SENTENCE WAS IMPOSED UNDER THE INFLUENCE

OF PASSION, PREJUDICE, AND OTHER ARBITRARY FACTORS.

The jury was repulsed by the death of an eighty-two year old white man caused by a twenty-one year old black man and were impassioned by the gory and inflamatory photographs.

The sentence of death was imposed in this case when no convicted murder has died in the Georgia electric chair in approximately eightteen years. The jurors could have reasonably believed, and the Appellant submits that they did in fact believe, such a sentence would never be carried out. If they had known that this Appellant would in fact be executed they would not have voted for infliction of the death penalty.

ENUMERATION NO. 5. THE COURT ERRED BY INSTRUCTING THE JURY TO DISREGARD APPELLANT'S MOTHER'S EMOTIONAL PLEA FOR HER SON'S LIFE DURING THE PENALTY PHASE OF THE TRIAL (T.356).

The mother of the Appellant was called as a witness on his behalf during the penalty phase of the trial. During questioning by Appellant's attorney she made an emotional plea for her son's life. She begged for his life and started crying (T.355). The Trial Judge instructed the jury to disregard the emotional outbreak (T.356). The credibility and demeanor of all witnesses is by law the exclusive judgment of the jury. Appellant submits that this is an impermissible comment by the Trial Judge and denied Appellant a fair hearing in the penalty phase of his trial. The State and the U. S.

Supreme Court distinguish a higher procedural safeguard when applied to death penalty cases.

ENUMERATION NO. 6. THE COURT ERRED IN FAILING TO DECLARE AND SQUASH THE GEORGIA DEATH STATUTE PROVIDING FOR THE IMPOSITION OF THE DEATH PENALTY.

Georgia Laws 1973, pp. 159, 163 (Ga. Code Section 27-2534.1) is discretionary and is applied discriminatorily against certain classes of defendants in violation of due process and equal protection clauses of Art. I, Sec. I, Pars. II and III of the Georgia Constitution (Ga. Code Sections 1-102, 2-103) and the Fourteenth Amendment to the United States Constitution.

The application of Georgia Laws 1973, pp. 159, 163 (Ga. Code Section 27-2534.1) has been unreasonable, arbitrary, and capricious because of the lack of definition and direction of application of "mitigating circumstances" resulting in the arbitrary application of the death penalty, in violation of the equal protection clause of Article I, Section I, Paragraph II of the Georgia Constitution (Ga. Code Section 2-102) and the Fourteenth Amendment to the United States Constitution.

The categories of aggravating circumstances in Georgia Laws 1973, pp. 159, 163 (Ga. Code Section 27-2534.1) are unreasonable and arbitrary in violation of the equal protection clause of Art. I, Sec. I, Par. II of the Georgia Constitution (Ga. Code Section 2-102) and of the Fourteenth Amendment to the United

States Constitution.

Georgia Laws 1974, pp. 352, 353 (Ga. Code Section 27-2302) allows the jury subjective discretion in applying the death penalty in violation of Furman v. Georgia, supra, and of the Eighth and Fourteenth Amendment to the United States Constitution.

Georgia Laws 1973, pp. 159, 165 (Ga. Code Section 27-2537(f)), provides for the collection of data on sentences imposed in capital felony cases after January 1, 1979, for purposes of reviewing death sentences as excessive or disproportionate or arbitrary. This statutory check against arbitrary and discriminatory application of the death penalty is not being complied with, hereby depriving defendants sentenced to death of an effective or adequate review of their sentence in violation of due process of law.

The death penalty in the above stated case is arbitrary because:

1. The death penalty is in fact administered and applied arbitrarily, capriciously, and whimsically in the State of Georgia; and if sentenced to death William Alvin Smith will be executed, pursuant to a pattern and practice of wholly arbitrary and capricious infliction of that penalty in violation of his rights guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution.

2. The Supreme Court of the United States upheld the Georgia capital punishment statutes "[on] their face" only upon the assumption that the procedures mandated by the statutes would assure that sentences of death are not wantonly or freakishly imposed. Gregg v. Georgia, 428 U.S. 153, 198 (1976). As those statutes have been applied, however, death sentences in Georgia have in fact been imposed in an arbitrary and capricious manner.

ENUMERATION NO. 7. THE COURT ERRED IN FAILING TO DECLARE THE GEORGIA UNIFIED APPEAL UNCONSTITUTIONAL.

William Alvin Smith is denied his rights to effective assistance of counsel. When he is required to divulge to the Court information that he should be able to share solely with his attorney it intervenes in the privacy of the attorney-client privilege. In addition, the Unified Appeal interferes with the attorney-client trust relationship as the Court is constantly questioning the judgment of the accused's counsel.

Appellant is denied his right to be free from self-incrimination. When the Court asks questions he is forced to divulge information which he should reveal only to his attorney.

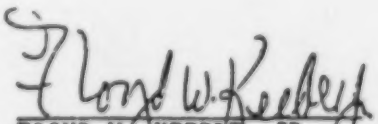
Appellant is deprived of his right to due process of law when he is asked to make decisions about the skills of his attorney and whether he wishes to raise any legal issues. This is a matter which is solely within knowledge of an attorney.

The attorney for Appellant is not competent to assess multitude of rights and procedures listed in the Unified Appeal given the limited resources available to an indigent in a death penalty case. The attorney for an indigent cannot conduct the preparation and investigation necessary to make intelligent and sensitive judgments with respect to his client's constitutional rights. These provisions of the Ga. Code both facially and as applied violate Appellant's privilege against self-incrimination, rights to a fair trial, effective assistance of counsel, and due process of law as guaranteed by the Georgia Constitution and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Appellant therefore requests this Court to overturn his conviction for murder and the sentence of death imposed on him for the reasons given above.

Respectfully submitted,



FLOYD W. KEEBLE, JR.
Attorney for Appellant

315 Bond Street
Royston, Georgia 30662
Phone: 404/245-5088

STATE OF GEORGIA,

COUNTY OF OGLETHORPE.

CERTIFICATE OF SERVICE

I, Floyd W. Keeble, Jr., attorney for William Alvin Smith, the Appellant, do hereby certify that I have this date served the HONORABLE J. CLEVE MILLER, District Attorney of the Oglethorpe County Superior Court, P. O. Box 247, Elberton, Georgia 30635; the HONORABLE LINDSEY A. TISE, JR., Assistant District Attorney of Oglethorpe County Superior Court, P. O. Box 633, Hartwell, Georgia 30643; and the HONORABLE MICHAEL J. BOWERS, Attorney General of the State of Georgia, Room 132, Judicial Building, Atlanta, Georgia 30334, with a copy of the within and foregoing Brief on Behalf of Appellant by placing same in the United States Mail, postage prepaid, being their last known addresses.

This the 2 day of January, 1982.

Floyd W. Keeble Jr

FLOYD W. KEEBLE, JR.
Attorney for Appellant

315 Bond Street
Royston, Georgia 30662
Phone: 404/245-5088

APPENDIX B

(175 SE2d 657) (1970).

38358. IN THE INTEREST OF R. A. S.

WELTNER, Justice.

On May 1, 1981 the Georgia Department of Human Resources (the Department), acting by and through the DeKalb County Department of Family and Children Services, filed a petition to terminate the parental rights of appellee, the mother of R. A. S., in the Juvenile Court of DeKalb County, Georgia, the county in which the child was present at the time the action began. Appellee moved to dismiss the petition for want of venue, contending that she was a resident of Gwinnett County. Citing the decision of this court in *Quire v. Clayton County Dept. of Family & Children Servs.*, 242 Ga. 85 (249 SE2d 538) (1978), the Juvenile Court of DeKalb County dismissed the petition, stating that venue was in Gwinnett County.

The Department urges venue in DeKalb County under the provisions of Code Ann. § 24A-1101: "A proceeding under this Code [Title 24A] may be commenced in the county in which the child resides. If delinquent or unruly conduct is alleged, the proceeding may be commenced in the county in which the acts constituting the alleged delinquent or unruly conduct occurred. *If deprivation is alleged, the proceeding may be brought in the county in which the child is present when it is commenced*; . . ." (Emphasis supplied.)

In *Quire*, supra, we held that where the proceeding involves only the termination of parental rights, the parents have the constitutional right to defend such a suit in the county in which they reside, citing Ga. Const. 1976, Art. VI, Sec. XIV, Par. VI (Code Ann. § 2-4306).[1] Observing that the jurisdiction of the juvenile courts includes cases criminal in nature and cases civil in nature, we concluded: "We do not find that the termination of parental rights falls in the quasi-criminal area. For those that do, delinquency, unruliness and juvenile traffic offenses, the venue provisions of the juvenile code and the State Constitution, that venue lies in the county in which the act was committed, are in accord. . . . Having concluded that delinquency, unruliness and traffic offender proceedings are quasi-criminal in nature and that the other proceedings under the juvenile court's jurisdiction are not, the criminal venue provisions cannot justify bringing this termination of parental rights action in Clayton County when the parents are Fulton County residents." 242 Ga. at 87.

[1] "All other civil cases shall be tried in the county where the defendant resides, and all criminal cases shall be tried in the county where the crime was committed, except cases in the Superior Courts where the Judge is satisfied that an impartial jury cannot be obtained in such county."

Subsequent to our decision in *Quire*, the Georgia General Assembly adopted a proposed constitutional amendment which rewrote Art. VI, Sec. XIV, Par. VI as follows: "All other civil cases, except juvenile court cases as may otherwise be provided by the Juvenile Court Code of Georgia, shall be tried in the county where the defendant resides, and all criminal cases shall be tried in the county where the crime was committed, except cases in the Superior Courts where the Judge is satisfied that an impartial jury cannot be obtained in such county." Ga. L. 1980, p. 2174. The amendment was ratified by the people and became effective on January 1, 1981. Ga. Const. 1976, Art. XII, Sec. I, Par. IV (Code Ann. § 2-6904). The Department contends that this provision removed any constitutional impediment to the application of Code Ann. § 24A-1101 to termination proceedings, and that the juvenile court erred in dismissing the petition filed in DeKalb County.

It is well settled law in this State that "[t]he time with reference to which the constitutionality of an act of the General Assembly is to be determined is the date of its passage, and if it is unconstitutional then, it is forever void." *Jones v. McCaskill*, 112 Ga. 453, 456 (37 SE 724) (1900). " 'An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.' " *Herrington v. State*, 103 Ga. 318, 320 (29 SE 931) (1898), quoting Norton v. Shelby County, 118 U. S. 425, 442 (6 SC 1121, 30 LE 178) (1886). It follows that once a statute is declared unconstitutional and void, it cannot be saved by a subsequent statutory amendment, as there is, in legal contemplation, nothing to amend. *City of Atlanta v. Gower*, 216 Ga. 368 (116 SE2d 738) (1960). Nor can a void statute be revived by a subsequent constitutional amendment. *Jamison v. City of Atlanta*, 225 Ga. 51 (165 SE2d 617) (1969). Similarly, where a statute is held to be unconstitutional and void in part, a subsequent constitutional amendment cannot revive the void portion. *Commrs. of Rds. & Revenues v. Davis*, 213 Ga. 792 (102 SE2d 180) (1958). For an illuminating treatment of this area of our law see Sentell, *Unconstitutionality in Georgia: Problems of Nothing*, 8 Ga. L. Rev. 101 (1973).

While reaffirming these principles, we conclude that the case before us today is distinguishable. In *Quire*, supra, we did not hold Code Ann. § 24A-1101 to be unconstitutional in whole or in part. We

and the wallet, hammer, shirt, and $237.00 were recovered. Smith confessed to the crime and stated: "The reason for my actions, I was trying to get money for another car."

Shortly after the crime, a local veterinarian discovered Turner in his store under a large empty aluminum trash barrel, and several large cardboard boxes and other pieces of trash. Across the top of his head was a deep gash. He was lying unconscious in a pool of blood. His glasses had been knocked crooked; his false teeth plate was across his mouth. A broken knife blade was found in the fold of his shirt. Turner had been stabbed once below the corner of the right eye, four times in the upper right side of the chest, and twelve times in the back. He also had been struck in the head with a blunt instrument and a medical expert testified that these wounds could have resulted from the blows of a hammer. The 82-year-old victim died the next day from blunt force trauma to his head.

The sentence of death in this case rests upon the aggravating circumstances set forth in Code Ann. § 27-2534.1 (b) (7): "The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." We review the sentence in light of the United States Supreme Court's decision in Godfrey v. Georgia, 446 U. S. 420 (100 SC 1759, 64 LE2d 398) (1980), as construed by this court in *Hance v. State*, 245 Ga. 856, 861 (268 SE2d 339) (1980), as follows: "Torture occurs when the victim is subjected to serious physical abuse before death." The victim in this case was not killed instantaneously, but was stabbed a total of 17 times and then beaten about the head with a hammer. The victim lived almost a full day after the crime.

A defendant who tortures his victim may be found to have a depraved mind; and the age and physical characteristics of the victim may be considered in determining depravity of mind. *Hance v. State*, supra at 862.

This was not a "domestic" murder. The victim gave Smith no reason to assault him, and was in no manner threatening. Rather, Smith had known the victim for as long as he could remember, and the victim had been "good to him." Smith fled and attempted to hide his crime. See Godfrey v. Georgia, supra. The sole motive for the murder was the armed robbery of the victim to obtain money to purchase another car.

The evidence substantiates and supports the findings of the statutory aggravating circumstances, and the sentence of death. Under the facts of this case, we find that the murder was the type universally condemned by civilized society as wantonly vile, horrible, and inhumane as it involved torture to the victim as set forth above.

8. We have reviewed the instruction of the trial court during the sentencing phase of the trial and find that the charge was not subject to the defects dealt with in *Fleming v. State*, 240 Ga. 142 (240 SE2d 37) (1977), and *Hawes v. State*, 240 Ga. 327 (240 SE2d 833) (1977). In reviewing the death penalty, we have considered the cases appealed to this court since January 1, 1970 in which a death or life sentence was imposed and have listed in the appendix twenty-three similar cases imposing the death penalty.

This was a cold-blooded killing of an elderly man, committed in the course of an armed robbery, with the sole motive being financial gain. The cases in the appendix involve the unprovoked killing of an unarmed victim or victims during an armed robbery, and, therefore, illustrate a jury's willingness to impose a death sentence under these circumstances. Smith's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Judgment affirmed. All the Justices concur.

DECIDED APRIL 6, 1982.

Murder, etc. Oglethorpe Superior Court. Before Judge Grant.

Floyd W. Keeble, Jr., for appellant.

J. Cleve Miller, District Attorney, Lindsay A. Tise, Jr., Assistant District Attorney, Michael J. Bowers, Attorney General, Virginia H. Jeffries, for appellee.

APPENDIX.

Cunningham v. State, 248 Ga. 558 (284 SE2d 390) (1981); *Cervi v. State*, 248 Ga. 325 (282 SE2d 629) (1981); *Justus v. State*, 247 Ga. 276 (276 SE2d 242) (1981); *Solomon v. State*, 247 Ga. 27 (277 SE2d 1) (1980); *Dick v. State*, 246 Ga. 697 (273 SE2d 124) (1980); *Dampier v. State*, 245 Ga. 427 (265 SE2d 565) (1980); *Tucker v. State*, 244 Ga. 721 (261 SE2d 635) (1979); *Gates v. State*, 244 Ga. 587 (261 SE2d 489) (1979); *Cobb v. State*, 244 Ga. 344 (260 SE2d 60) (1979); *Baker v. State*, 243 Ga. 710 (257 SE2d 192) (1979); *Ruffin v. State*, 243 Ga. 95 (252 SE2d 472) (1979); *Potts v. State*, 241 Ga. 67 (243 SE2d 510) (1978); *Moore v. State*, 240 Ga. 807 (243 SE2d 1) (1978); *Stanley v. State*, 240 Ga. 341 (241 SE2d 173) (1977); *Corn v. State*, 240 Ga. 130 (240 SE2d 694) (1977); *Pulliam v. State*, 236 Ga. 460 (224 SE2d 8) (1976); *Dobbs v. State*, 236 Ga. 427 (224 SE2d 3) (1976); *Mitchell v. State*, 234 Ga. 160 (214 SE2d 900) (1975); *Floyd v. State*, 233 Ga. 280 (210 SE2d 810) (1974); *Gregg v. State*, 233 Ga. 117 (210 SE2d 659) (1974); *Hunter v. State*, 231 Ga. 494 (202 SE2d 441) (1973); *Kramer v. State*, 230 Ga. 855 (199 SE2d 805) (1973); *Lingo v. State*, 226 Ga. 496

There being no evidence, and no suggestion by counsel, of an inability to distinguish between right and wrong or of acts which were the consequence of an insane delusion, any want of precision in the charge relative to these two principles is at most harmless error. *Lively v. State*, 178 Ga. 693 (12) (173 SE 836) (1934); *Reece v. State*, 212 Ga. 609 (94 SE2d 723) (1956); *Woods v. State*, 214 Ga. 546 (105 SE2d 896) (1958).

We note, also, that the court submitted to the jury a prepared verdict in the form as follows:

"VERDICT

COUNT I: 'We, the jury, find the defendant (guilty-not guilty) of murder.'

COUNT II: 'We, the jury, find the defendant (guilty-not guilty) of armed robbery.' "

After the charge, defense counsel remarked that the form did not contain a place for a finding of not guilty by reason of insanity. There was, however, no objection. The court inquired of the defense counsel "Do you think that's all right?" He responded, "Yes, sir."

The failure of the court to submit a form including all of the possible forms of the verdict was not harmful, in view of our holding as to the issue of insanity in this case.

If prepared forms for verdicts are to be submitted to juries, it is obviously preferable that the submission contain a form for each verdict which might be permissible in the case. Because court-submitted documents are still rare in our practice, particular attention should be given, lest the jury draw an inference, however unfounded, of pre-disposition on the part of the trial judge. Here, as an example, the form contains in parentheses the words "guilty-not guilty." While there is no such evidence in this case, some other jury might perceive the antecedence of the word "guilty" over the words "not guilty" to be expressive of the view of the court. It would be safer were the words guilty and "not guilty" omitted entirely from the form, to be completed by the hand of the jury.

Sentence Review

As required by Ga. L. 1973, p. 159, et seq., (Code Ann. § 27-2537 (c) (1-3)), we have reviewed the death sentence in this case. We have considered the aggravating circumstances found by the jury, and the evidence concerning the crime and the defendant.

As provided for by the Unified Appeal procedure, we have reviewed independently the record and transcript and find no significant potential of error other than those enumerated by the

appellant.

6. Appellant argues that the sentence of death was imposed under the influence of passion, prejudice and other arbitrary factors, because the jury was inflamed by the death of an 82-year-old white man by a 21-year-old black man, together with gory photographs. We do not agree. Two photographs were not cumulative nor unnecessarily gruesome considering the scenes which they depicted. They are plainly admissible. Division 1, supra. The record is bare of any indication that the jury abdicated its oath for passion or prejudice. The appellant further asserts the "Private Slovik syndrome" for the first time on appeal. This argument is without merit. *House v. Stynchcombe*, 239 Ga. 222 (236 SE2d 353) (1977); *Cape v. State*, 246 Ga. 520 (272 SE2d 487) (1980). We find that the sentence of death was not imposed under the influence of passion prejudice or any other arbitrary factor.

7. The jury found the following statutory aggravating circumstances justifying the death sentence: "The repeated stabbings along with two blows in the head justifies aggravating circumstances. Also the fact he was first stabbed in the back. Also the fact that he received the blows to his head after he was lying on the floor suffering from the stab wounds. For the said offense of murder was outrageously and wantonly vile, horrible and inhumane, in that the murder involved torture, depravity of mind and aggravated battery to the victim."

The State presented evidence that on June 8, 1981, Smith walked to Turner's grocery store in Lexington, Georgia. Smith had known Turner, whom he referred to as "Mr. Dan," as long as he could remember, and Turner had always been good to him. When he arrived at the store, Turner was asleep but awoke to wait on him. He asked for a pack of cigarettes and observed that Turner was alone. When Turner reached around for the cigarettes, Smith grabbed him and Turner resisted. Smith pulled a knife out of his back pocket and repeatedly stabbed Turner until Turner dropped a hammer he had picked up. Smith grabbed the hammer and hit Turner with it twice in the head. At that time Smith saw that Willie Robinson had come to the door. The appellant went to the door and told Willie Robinson, "Damn, I have killed Mr. Dan." He instructed Willie Robinson not to tell anyone. Smith thereafter went back in the store from the front door and took money from the cash register and Turner's wallet. He was observed running from the store. While he was running, he wrapped his shirt around his bleeding hand and the hammer. As he ran, he threw the hammer and the shirt on the side of the road. Eventually he threw Turner's wallet away.

Smith was captured by authorities on the night of the murder

3. Smith's fifth enumeration of error asserts that the trial court erred in instructing the jury to disregard an emotional outcry by Smith's mother during the sentencing phase of the trial.

The transcript reflects the following events during examination of Smith's mother by his counsel:

"MRS. SMITH: I'm begging y'all. Please don't take him away from me. (Witness crying). Punish him, yes, but don't kill him.

"MR. KEEBLE: Miss Mary, please compose yourself. All right? Just answer [the District Attorney's] questions."

The District Attorney then cross-examined Mrs. Smith, asking but seven questions, whereupon the witness was dismissed, and another witness was called on behalf of Smith. It was at *this* point that the court stated to the jury: "Ladies and gentlemen of the jury, I believe this is a serious matter, but I will ask you to please disregard the emotional outbreak. It has no part in this trial. We're here to decide this matter — you are — from the evidence and the law, and you decide it from that."

No objection was made to this instruction and we cannot say that the trial court abused its discretion in so instructing the jury. *Messer v. State*, 247 Ga. 316, 324 (6) (276 SE2d 15) (1981), and cases cited. It is apparent that the trial judge's ruling was not an impermissible comment on the evidence. See *High v. State*, 247 Ga. 289 (276 SE2d 5) (1981).

4. In his sixth and seventh enumerations, Smith contends that both the death penalty statute and the Georgia Unified Appeal procedures are unconstitutional, both as constituted, and as applied in this case. "This court and the Supreme Court of the United States have upheld the constitutionality of the Georgia death penalty statute in a number of cases, and the appellant has advanced no new reason for us to reconsider our position. Gregg v. Georgia, 428 U. S. 153 (96 SC 2909, 49 LE2d 859) (1976); *Legare v. State*, 243 Ga. 744 (257 SE2d 247) (1979)." *Stevens v. State*, supra at 707.

Smith avers that the statutes have been applied in fact in an arbitrary and capricious manner. He points to no facts which support this conclusion. The same attack has been raised before and decided adversely to Smith's position. McCorquodale v. Balkcom, 525 FSupp. 408, 525 FSupp. 431 (N. D. Ga. 1981).

This court has also upheld the constitutionality of the Unified Appeal procedure in *Sliger v. State*, 248 Ga. 316 (282 SE2d 291) (1981), cert. denied, —— U. S. —— (decided February 22, 1982). Certainly, to determine at a state in the proceeding when a remedy might be provided whether a client is satisfied with his attorney's handling of his case is not invading the attorney-client relationship, as urged upon us by Smith. Neither does that determination call into question the "judgment of the accused's counsel." Similar procedures are used to determine competency of counsel when guilty pleas are tendered. *Fair v. State*, 245 Ga. 868, supra; and, it cannot seriously be argued that these procedures, which are designed to protect the rights of a defendant, violate the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

5. We have studied the entire record of this case, and turn now to two matters which are not addressed in the enumeration of errors.

The trial court charged on insanity as follows: "Thus, if you find the defendant did not have reasonable sufficiency to distinguish between right and wrong because of mental disease, injury or congenital deficiency, *and* [emphasis supplied] that he acted ... he did because of delusional compulsion, as I have instructed you, at the time the commission of such alleged offense, that would be an end of your consideration of this case and you would stop at that point and enter a verdict that would reflect your findings. And the form of that verdict would be, 'We, the jury, find the defendant not guilty by reason of insanity.' "

It is possible that the use of the conjunction "and" might be understood by the jury to imply that a verdict of not guilty by reason of insanity would require both an inability to distinguish right and wrong and delusional compulsion.

We have reviewed the record in this case relative to any evidence of insanity which could support a finding of not guilty by reason of insanity. The most the evidence shows is that Smith had a low IQ, possibly equivalent to that of an eleven-year-old child. There is a vast difference between low intelligence and an inability to distinguish between right and wrong. Indeed, the psychiatric testimony in the case indicates that 10% of the adult population has an intelligence level not greater than Smith's.

In final argument, Smith's counsel addressed the question of insanity as follows: "And [the judge] will charge you, I would expect, that you are to consider in your deliberations, taking your experience into that jury room, that you are to consider the absolute senselessness of the act. I will say to you the absolutely bizarre, totally senseless taking of Mr. Dan's life. You can consider that, ladies and gentlemen, in your deliberation. And, in that event, you would be authorized, if you so found, that because of the very nature of the act and the other evidence that has been presented to you, and I submit to you his IQ level, that he was insane at the time he did it. He just went berserk. No planning was involved in this thing. Certainly there's no logic to it, any way you can look at it. So I submit to you, ladies and gentlemen, that we're talking about a ten or eleven year-old child. ...."

have changed over the years, by statute and interpretation, and will doubtless continue to change in the future. "We would remark, in conclusion, that evidence must accommodate itself, and it is constantly doing so, to the state of society and the concerns of the world around us." Lumpkin, C. J., in *Hart v. Powell*, supra, at 642.

Therefore, a trial judge's determination that evidence offered as part of the *res gestae* is sufficiently informative and reliable as to warrant being considered by the jury will not be disturbed on appeal unless that determination is clearly erroneous.

As to other enumerations of error, the evidence was sufficient to enable a rational trier of fact to find the guilt of the accused beyond a reasonable doubt; the trial court did not err in admitting statements of the accused after a Jackson-Denno hearing; and there was no error in admitting scientific evidence concerning blood-alcohol content, nor in the charge of the court. Andrews' attack upon the composition of the grand and trial jury lists, coming as it did after conviction, is not timely. *Young v. State*, 232 Ga. 285 (206 SE2d 439) (1974). All other enumerations of error are without merit.

Judgment affirmed. All the Justices concur, except Gregory, J., who concurs in the judgment only.

DECIDED APRIL 6, 1982.

Murder. Putnam Superior Court. Before Judge Duke.

Donald W. Huskins, for appellant.

Joe Briley, District Attorney, Michael J. Bowers, Attorney General, W. Davis Hewitt, Assistant Attorney General, for appellee.

38247. SMITH v. THE STATE.

WELTNER, Justice.

The defendant was convicted of armed robbery and murder of 82-year-old Daniel Turner. The jury returned a finding that the murder was outrageously and wantonly vile, horrible and inhuman in that the murder involved torture, depravity of mind and aggravated battery to the victim, and recommended that the defendant be sentenced to death. The trial court then sentenced the defendant to death for murder, and life imprisonment for the armed robbery.

1. In his first enumeration of error Smith contends that the trial court erred in admitting in evidence two black-and-white photographs of the victim. The two photographs showing the numerous stab wounds and head injuries received by the victim, one

frontal and one rear view, cannot be said to be repetitious or cumulative. The state complied with our suggestion in *Florence v. State*, 243 Ga. 738, 741 (fn. 1) (256 SE2d 467) (1979). The photographs were relevant in that they depicted the location and nature of the wounds received by the victim and corroborated the confession of the defendant. *Davis v. State*, 242 Ga. 901 (252 SE2d 443) (1979); *Brooks v. State*, 244 Ga. 574 (261 SE2d 379) (1979); *Cobb v. State*, 244 Ga. 344 (260 SE2d 60) (1979); *Franklin v. State*, 245 Ga. 141 (263 SE2d 666) (1980); *Fair v. State*, 245 Ga. 868 (268 SE2d 316) (1980); *Dick v. State*, 246 Ga. 697 (273 SE2d 124) (1980). We find no merit in this enumeration of error.

Smith further complains that by admitting the photographs, the jury was given the opportunity to make a decision as to the [illegible] death. The defendant overlooks the fact that this is the ultimate [illegible] facing the jury in any murder trial — death at the hand of the defendant.

2. In his second and third enumerations of error, Smith contends that the trial court erred in not defining the term "mitigating" and in not specifying the mitigating circumstances offered by him.

In *Potts v. State*, 241 Ga. 67, 86 (16) (243 SE2d 510) (1978), this court held: "Under Georgia law, mitigating circumstances are not required to be singled out in the charge. *Thomas v. State*, 240 Ga. 393, 401 (242 SE2d 1) (1977)"; and in *Collier v. State*, 244 Ga. 553, 568-9 (12) (261 SE2d 364) (1979), the court held: "The trial court charged that the jury was to 'consider all the evidence submitted in both phases of the trial in arriving at your verdict, including any and all evidence of mitigating circumstances.' It is not required that specific mitigating circumstances be singled out by the court in giving its instructions to the jury. [Citations omitted.] To influence the jury by use of examples may limit their discretion to consider other matters in addition to the examples given. A charge such as the one requested may influence the jury either to weigh mitigation against aggravation or to limit their consideration to whether mitigating circumstances exist. Under our statute the jury may recommend a life sentence even though no mitigating circumstances are found." Accord, *Stevens v. State*, 247 Ga. 698 (18) (278 SE2d 398) (1981).

The charge concerning mitigation was not improper, nor was it subject to the deficiencies discussed in Spivey v. Zant, 661 F2d 464 (5th Cir. 1981). The triers of fact were not limited in what they might consider in mitigation. Eddings v. Oklahoma, —— U. S. —— (102 SC 869, 71 LE2d 1) (1982). Mitigation being a word of common meaning and understanding, it is not error to fail to define it. *Cape v. State*, 246 Ga. 520 (272 SE2d 487) (1980).

APPENDIX C

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

WILLIAM ALVIN SMITH, Petitioner, v. ROBERT O. FRANCIS, Warden Georgia Diagnostic and Classification Center, Respondent.	]	Habeas Corpus Case No. 5804

PETITIONER'S MEMORANDUM OF LAW

IN SUPPORT OF PETITION FOR A WRIT OF HABEAS CORPUS

Stephen B. Bright
600 Healey Building
57 Forsyth Street, N.W.
Atlanta, Georgia 30303

Stephen H. Glickman
ZUCKERMAN, SPAEDER, MOORE,
TAYLOR & KOLKER
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036

Counsel for Petitioner

L. Infliction of the Death Penalty on Petitioner Constitutes Cruel and Unusual Punishment.

The infliction of the death penalty on a retarded human being such as petitioner takes this case out of the mine run of capital cases. It forces this Court to confront whether the Constitution tolerates imposing the most merciless and irrevocable of punishments on that well-recognized class of people who, from inherent mental defect and not any moral fault, are least able to understand and obey society's strictures. Specifically, the question is whether the cruel and unusual punishment clause of the Eighth Amendment forbids the execution of mentally retarded persons such as petitioner.

The Supreme Court most recently held a death sentence cruel and unusual in Enmund v. Florida, ____ U.S. ____, 102 S.Ct. 3368, 73 L.Ed 2d 1140 (1982). There the Court held that the death penalty could not constitutionally be imposed on one who aided and abetted a robbery during which murder was committed by others but did not himself kill or intend to kill. Enmund's analysis of the cruel and unusual punishment clause in those circumstances establishes the controlling principles here.

To begin with, the issue is not whether death is a disproportionate penalty for murder, but rather whether it is a valid penalty for the particular offender. Enmund v. Florida, 102 S.Ct. at 3377, 73 L.Ed 2d at 1152. "The focus must be on his culpability, ... for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' ... which means that we must

focus on 'relevant facets of the character and record of the individual offender.'" Id. (citations omitted; emphasis in the original).

Death is a disproportionate punishment for the particular offender in question if the legitimate purposes of capital punishment would not be substantially fostered by its infliction on persons like him. Two purposes of the death penalty have been accepted by the Supreme Court: retribution, and deterrence of capital crimes by prospective offenders. Gregg v. Georgia, 428 U.S. at 183. "Unless the death penalty when applied to those in [the defendant's] position measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." Enmund, 102 S.Ct. at 3377, 73 L.Ed.2d at 1152 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

The Court struck down the death penalty in Enmund's case because neither deterrence nor retribution would have been significantly furthered by its infliction. As we shall see, its mode of analysis is highly pertinent to petitioner's case. Regarding deterrence, the Court considered the effect on those similarly situated to Enmund, and declared itself "quite unconvinced" that the possibilty of capital punishment for vicarious felony murder would deter those who do not contemplate the killing. Id., 102 S.Ct. at 3377,

73 L.Ed 2d 1152-1153. The Court quoted with approval Justice Frankfurter's observation in Fisher v. United States, 328 U.S. 463, 484 (1946), that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation." Id.

The Court also dismissed the notion that retribution could justify the execution of Enmund. Retribution, the Court held, must be tailored to the defendant's "personal responsibility and moral guilt." Id., 102 S.Ct. at 3378, 73 L.Ed.2d at 1154. The defendant's mental state is critical to this assessment. Id. Absent the intention to kill, the defendant's culpability would not be so great that his execution would "measurably contribute to the retributive end of insuring that the criminal gets his just desserts." Id. The Court observed that it had "employed a similar approach in Godfrey v. Georgia, 446 U.S. 420, 433 (1980), reversing a death sentence based on the existence of an aggravating circumstance because the defendant's crime did not reflect 'a consciousness materially more "depraved" than that of any person guilty of murder.'" Id.

The application of the foregoing principles to petitioner's situation requires first that his relevant personal characteristics be identified and described. As in Enmund, the focus must be on petitioner's mental condition and its relation to his offense. Then it is necessary to weigh the efficacy of capital punishment for people like petitioner in achieving the goals of retribution and deterrence.

As has been said, petitioner's outstanding characteristic is his unquestioned mental retardation. At his trial, Dr. Everett Clark Kuglar, Superintendent of the Georgia Regional Hospital, testified that petitioner's full-scale I.Q. was 65, that he was mildly retarded, and that his abilities were roughly those of "a youngster in the 10 to 11 year age range." (Tr. at 280-281.) Mr. Merrill L. Gay, former assistant principal of petitioner's middle school, testified that petitioner had been placed in the educable mentally retarded class on the basis of his I.Q. score. (Tr. at 273.) Regrettably, however, the significance of this evidence of petitioner's mental handicap was never developed at his trial. In particular, the behavioral consequences of his impairment were scarcely addressed. Instead the jury may wrongly have been led to believe that petitioner was merely a slow learner. (Tr. at 275.) As discussed earlier in this memorandum, this failure to do more than barely scratch the surface was attributable to petitioner's trial counsel's lack of preparation. See supra, pp. 6-8.

The affidavits admitted in evidence at petitioner's habeas hearing begin to make up for the evidentiary void in the trial record. The affidavit of Dr. Brad Fisher, an experienced and respected clinical-correctional psychologist, provides a comprehensive picture of petitioner. Dr. Fisher's evaluation is based on his own interviewing and testing of petitioner, described in detail at pages 4-6 and 8-12 of his affidavit; his interviews with petitioner's parents and siblings; his review of the testimony at peti-

tioner's trial, including the testimony of Dr. Kuglar and Mr. Gay; and his study of previous test data on petitioner from his school records. (See the affidavit of Lindsey Shiver, psychometrist for the Oglethorpe County school system, and records accompanying that affidavit.) Dr. Fisher's affidavit is supplemented and corroborated by the affidavits of numerous relatives, friends and acquaintances of petitioner.

The portrait of petitioner which emerges when all the evidence is considered is of a mentally impaired young man whose retardation has had profound behavioral consequences. Any notion that petition is merely a "slow learner" is just wrong.

To begin with, the evidence certainly confirms Dr. Kuglar's testimony that petitioner has a mental age of between ten and eleven years. It is clear that petitioner has been recognizably retarded from an early age. With a full scale I.Q. of 65, he falls within the bottom 2.2% of the population. Fisher Affidavit at page 17. It did not require sophisticated testing, however, to discern petitioner's mental limitations. The affidavits of lay witnesses who knew him as relative or acquaintance attest to this. In them petitioner is variously described as being slow, limited and childlike, as in the following illustrative excerpts:

William was slow, and if you were around the family for a long time you would pick up on the fact that he was not like his brothers and sisters. He was not as active as they were and he was very limited in his ability to understand.... Even up until the time of his arrest, William acted more like a little child than a grown up or a young adult. (Affidavit of Furman Sims.)

He was much slower than his brothers and sisters and other children, but he was quiet, never caused any problems and respected older people. Even as he grew older, Noodle still thought pretty much like a child. He was just like a very big kid. (Affidavit of Evelyn Sims.)

William always talked about things in a child-like way.... He never seemed to understand what things were about .... William has a child's mind. When he would come by our place on Sundays, he played and acted like a child. He would play an Elvis Presley record and talk about how he wanted to be like Elvis and how he wanted to be a movie star. He talked the way children talk about what they want to do when they grow up. William never really grew up. (Affidavit of Carolyn Faust.)

Noodle is not bright. Sometimes when you talked to him, it was like he was in another world. He had trouble paying attention.... Even though he had very limited mental abilities, he did the best he could. (Affidavit of Virginia Smith) (no relation).

Although William started school before I did, I caught up with him in school .... William had problems in school because he could not keep up with everyone else.... he could not read except for a little bit, and he could not answer questions and participate in class like other students. (Affidavit of Willie David Smith, brother.)

William was different from all of the other children in our family. He was slow. I think that perhaps someone might at first just think he was quiet, but William could not learn like the rest of us. I would spend a lot of time with him working on homework, but William just did not understand it. He was the slowest one in our home.... [We] had to look out for him and help him with school work because he was slow.... (Affidavit of Shirley Ann Smith, sister.)

I have seven other children besides William. The other children always talked more and were more active growing up than William. William did not cry much as a baby or when he was spanked, and he never said very much. He had difficulty learning and understanding. He remained quiet and to himself more than most children. He was held back in school and he was larger than the other children. He was placed in some special classes at school, but he still was not able to keep up. William was just not able to learn the way most children can. I have tried to teach him things, and if they are simple enough he can do them, but more complicated things are too much for him. I tried to teach him to wrap meat so he could help me in my work as a meat cutter, but William could never figure out how to do it right. The other children are able to do it without any trouble at all.

Because of William's limitations, he required more supervision than our other children. He did not give us a lot of trouble, but he required a lot of patience and attention. If you told William to do something and showed him how to do it and worked with him, he would do whatever was asked of him. (Affidavit of Willie B. Smith, father.)

William had problems as a child, however, because he was severely limited in his ability to understand, to follow directions and to do things that most children can do. William was never able to learn to do things as soon as

his brothers and sisters, and, as they grew older, the other children were able to do things that William was never able to do.

When William was at home, after school or on weekends, I would ask him to help me clean the house. William would try and he could do things like sweep, but he could not do things like make the bed. When he got older, about age 16 or 17, my husband, who has been a meat cutter all of his adult life, tried to teach William how to cut meat and wrap it. William was never able to wrap a package of meat. The younger boys would come in and my husband would cut the meat, and show how to wrap it up and then label it so that you would know what cut of meat was inside the wrapping, but William, or "Noodle" as we all called him, was never even able to wrap the paper around the cuts the right way. Since he was never able to learn to wrap the meat, my husband never attempted to teach him how to cut it....

William was not smart enough to keep up with the other students in school. He was not able to read very well at all, he could not do arithmetic, and could not spell words. He could not say his ABC's, and I still do not know if he is able to say them all the way through. Although William was in the class for educable mentally retarded at school for a while, he was never given any special training to deal with his mental limitations and no preparation for dealing with life as an adult with his limitations. William was frustrated with school because he could not learn and because he was so much bigger than the other students in his class. Finally, when he got old enough, he just gave up on school and stopped going.

William was very quiet and a lot of people did not know how limited he was. But he could not do anything that was complicated or follow directions. He could not get a driver's license. William does not have the good judgment that some of his brothers and sisters have or that other people have. He had to be in special classes at school, because he was not able to keep up with the other students. William has always needed more attention and more guidance than other children I have had. (Affidavit of Mary Smith, mother.)

The other character traits reported in the affidavits indicate some behavioral consequences of petitioner's mental impairment. He is repeatedly described as being extraordinarily quiet and withdrawn, passive and docile, submissive to authority and happiest doing simple and repetitive tasks, however back-breaking. A noteworthy refrain in the affidavits is that he always kept his problems and worries bottled up inside himself. (See, e.g., affidavits of Denise Bolton, Marlene Cofer, Willie B. Henson, Mary Smith, Shirley Ann Smith, Willie David Smith and Sara Taylor.)

Dr. Fisher's clinical evaluation elaborates on the functional consequences of petitioner's mental defects. His conclusions, which are fully supported by the lay witness observations, are summarized in his affidavit as follows:

> The presence of this level of mental retardation indicates much more than just slow learning; it indicates impaired social judgment, impaired ability to understand or acknowledge the consequences of behavior, impaired ability to make rational judgments, increased dependency features, susceptibility to confusion and anxiety in stressful situations, tendency toward more impulsive behavior (this often based on the condition in which the retarded person has more frequent frustrations with the many situations that are confusing and complex to him or her, without the ability to appropriately vent that frustration) and some diminished capacity to distinguish between right and wrong. This latter category is different from an inability to distinguish between right and wrong that may be the case where the insanity issue is involved.)

(Fisher Affidavit, page 11; see also pages 8, 13-14, 16.)

Dr. Fisher's description of petitioner satisfies the statutory definition of a mentally retarded person as "a person having a significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior which originates in the developmental period." Off. Code of Ga. Ann. §37-4-1(r); see also §17-7-131, defining "mentally ill" in almost identical language.

Dr. Fisher also explains how the foregoing features of petitioner's personality contributed to the commission of the offense. It will be recalled that at his trial there was testimony that in the days immediately before the crime, petitioner appeared unusually despondent and agitated. (Tr. at 350-358.) No explanation for this mental state was offered, however. Dr. Fisher explains that petitioner had just suffered two especially traumatic blows to his self-esteem which were directly related to his impulsive outburst of violence:

> [T]he following features seem especially noteworthy in his description of situational components in the days surrounding the commission of the crime. First, it should be pointed out that one of the most important people in William's life at this time was his girlfriend. He described her as the first person near his own age who had really cared about him, and this had taken on extraordinary importance in his life. With this in mind, the fact that he had broken up with his girlfriend in the two days previous to the crime appears significant. His own description of this event included his feelings of total frustration and confusion over what to do about the breakup.

> A second factor revolves around the destruction of William's car the day before the crime. This automobile was his first material possession of consequence, and a major feature relating to his self-esteem and feelings of self-worth. It should be noted that at the time the car was destroyed he did not have a license, and the car was not paid for. This served to further heighten his level of frustration and resultant confusion because of his inability to deal with that frustration....
>
> If one was to rank the two most important things in William Smith's life, these would probably have been his girlfriend and his car. To have both of these taken away at the same time would have been traumatic for anyone; however, with his primary psychological dynamics including major limitations in his ability to deal with frustration, as well as easily formed frustration and confusion over typical life experiences not confusing to those not mentally retarded, these events take on special significance. For a person with William's level of retardation, it is important to have a simple, straightforward, and consistent foundation upon which to operate. In his case, the two critical ingredients of this somewhat shaky foundation had been removed, which brought into play the limitations connected with his retardation, much more than would have been the case for a person with normal intellectual functioning, frustration tolerance, and ability to not become confused by outside stimuli.

(Fisher Affidavit, pages 8-10.)

The characterization of petitioner's offense as just another murder with a crass pecuniary motive is thus altogether too simplistic. It is more fairly perceived as the tragi-

cally impulsive outburst of a normally docile, mentally handicapped young man in response to a level of inner turmoil, frustration and confusion which was beyond his ability to resolve and control.

Applying now the Supreme Court's analysis of the cruel and unusual punishment clause in Enmund, application of the death penalty to retardates like petitioner measurably serves neither deterrence nor retribution. As far as deterrence is concerned, retardates' behavioral disorders and intellectual deficiencies render them largely immune from the threat of punishment. As petitioner's case illustrates, their impulsivity and intellectual impairment virtually rule out the kind of fully contemplated and coolly calculated crime for which the threat of the death penalty can have a deterrent effect. Enmund, 102 S.Ct. at 3377-3378, 73 L.Ed 2d at 1152-1153.[27/] The retardate's diminished ability to project into the future and rationally contemplate the consequences of his acts further reduces the likelihood that he will appreciate and be restrained by the prospect of punishment, or that he will be influenced by variations in the degree of punishment. See Sternlicht and Deutsch, Personality Development and Social Behavior in the Mentally Retarded 80 (1972); Grigg, Criminal Behavior

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27/ See also Gregg v. Georgia, 428 U.S. at 185-186, distinguishing "murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect," from those who perpetrate "carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act."

of Mentally Retarded Adults, 52 Am. J. of Mental Defici 370, 371, 374 (1948).

Retribution is an even poorer justification for exe ting retardates such as petitioner, depending as it does on the degree of their personal culpability. Courts have long recognized in capital cases that the mentally retard are not to be held to normal standards of accountability. E.g., State v. Hall, 126 Neb. 295, 310, 125 N.W.2d 918, 927 (1964) (reducing death sentence to life imprisonment where defendant a moron with an I.Q. of 64); State v. Behler, 65 Idaho 464, 475-476, 146 P.2d 338, 343 (1944) (sentence of death reduced to life imprisonment because defendant "possesses a very low order of intelligence"); Commonwealth v. Green, 396 Pa. 137, 148, 151 A.2d 241, 247-248 (1959) (death penalty vacated in light of defendant's youth and dull normal intelligence); see also Woods v. State, 214 Ga. 546, 105 S.E.2d 896, 897 (1958) (jury instructed that weakmindedness, though no defense to the crime, may be grounds for recommendation of mercy). In virtually every state with a capital sentencing scheme, mental retardation is recognized in one way or another to be a mitigating factor in sentencing. The universal recognition that retardates are less culpable than normal people is reflected in Dr. Fisher's actual experience and research, see Fisher Affidavit at 13.

The complex of reasons why retardates are less responsible for their antisocial behavior than ordinary people is summarized in Dr. Fisher's affidavit. Persons

with petitioner's degree of mental handicap suffer as a consequence "impaired social judgment, impaired ability to understand or acknowledge the consequences of behavior, impaired ability to make rational judgments, increased dependency features, susceptibility to confusion and anxiety in stressful situations, tendency toward more impulsive behavior... and some diminished capacity to distinguish between right and wrong." Fisher Affidavit at 11. Dr. Fisher's description is strongly supported in the literature. On the retardate's special proneness to react immediately and violently to the urges of the moment, see, e.g., Bromberg, The Mold of Murder 202 (1961) (tendency of retardates to "react in a blinding flash of vengeance" against frustration and humiliation); Glueck, Mental Disorder and the Law 334-335 (1925) (retardate's defective control of instinctive behavior may lead to serious crimes of violence); Sternlicht and Deutsch, supra at 58 (failure of defense mechanisms of repression and inhibition impair retardates' ability to control aggressive and hostile impulses). As the last-named authors note,

> [The] retarded individual is especially prone to committing deviant acts because he will be subject to weak and ineffective functioning not only in the realm of conscience and values but in the realm of judgment and common sense as well. It is the latter deficit, in fact, which creates perhaps the more immediate and pervasive of the retardate's problems in the area of deviant and antisocial conduct.

Id., at 81. See also Tredgold and Soddy, Textbook of Mental Deficiency (10th ed. 1963) 252 (retardate may

evince an understanding of the "nature" of the act -- that it is forbidden -- without fully understanding its "quality").

In short, the infliction of the death penalty on mentally retarded offenders such as petitioner does not serve either of the two recognized purposes of capital punishment. It is therefore "nothing more than the purposeless and needless imposition of pain and suffering," Coker v. Georgia, 433 U.S. at 592, which the Eighth and Fourteenth Amendments forbid.

APPENDIX D

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

WILLAIM ALVIN SMITH, Petitioner, v. ROBERT O. FRANCIS, WARDEN GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, Respondent.	*	CIVIL ACTION NO. 5804 HABEAS CORPUS

POST-HEARING BRIEF ON BEHALF OF THE RESPONDENT

Pursuant to agreement of counsel at the conclusion of the hearing on the above-styled case on March 31, 1983, the Respondent hereby files this brief in opposition to the petition for a writ of habeas corpus.

I.

STATEMENT OF THE CASE

Petitioner, William Alvin Smith, was indicted in Oglethorpe County for the murder of Daniel Lee Turner. The Petitioner was tried by a jury on September 14, 1981, was found guilty, and was sentenced to death. The death penalty was imposed upon a finding of O.C.G.A. § 17-10-30(b)(7); Ga. Code Ann. § 27-2534.1(b)(7).

On direct appeal to the Supreme Court of Georgia, the Petitioner's conviction and sentence were affirmed. Smith v. State, 249 Ga. 228, 290 S.E.2d 43 (1982).

On October 4, 1982, the United States Supreme Court denied Petitioner's petition for a writ of certiorari, and on November 29, 1982, that Court denied Petitioner's petition for rehearing.

A petition for a writ of habeas corpus was filed in this Court, and a hearing was held on March 31, 1983.

K. THE APPLICATION OF THE SECTION (b)(7) AGGRAVATING CIRCUMSTANCE TO PETITIONER WAS NOT UNCONSTITUTIONAL.

The Petitioner next alleges that as in Godfrey v. Georgia, supra, the Petitioner's jury was inadequately instructed on the aggravating circumstance at issue and alleges that the evidence failed to support the aggravating circumstance. On direct appeal, the Georgia Supreme Court reviewed this issue, and held that the murder was wantonly vile, horrible, and inhuman as it involved torture to the victim. Smith v. State, 249 Ga. 228 (1982). Under the circumstances, the Respondent submits that this allegation is without merit.

L. THE IMPOSITION OF THE DEATH PENALTY UPON PETITIONER DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

The Petitioner alleges that the infliction of the death penalty constitutes cruel and inhuman punishment. Specifically, he alleges that the Eighth Amendment forbids the execution of mentally retarded persons such as the Petitioner alleges he is.

The record before this Court shows that the Petitioner was afforded a psychological examination, but that the evidence presented at trial did not support the theory that he was insane. However, the trial court did charge the jury on the law of insanity, although the jury chose to reject this verdict. On direct appeal, the Georgia Supreme Court reviewed the record in this case relative to any evidence of insanity, which could support a finding of not guilty by reason of insanity. The Supreme Court held:

> The most the evidence shows is that Smith has a low I.Q., possibly equivalent to that of an eleven year old child. There is a vast difference between low intelligence and inability to distinguish between right and wrong. Indeed, the psychiatric testimony in

> this case indicates that ten percent of the population has an intelligence level not greater than Smith's.

Smith v. State, supra, at 231.

The Respondent respectfully submits that the jury rejected the argument that the Petitioner was insane, and while there was evidence that the Petitioner had a low I.Q,. such is not a legal defense to murder in the State of Georgia and does not justify the allegation that the death penalty is cruel and unusual punishment.

M. PETITIONER WAS AFFORDED AN ADEQUATE APPELLATE REVIEW OF HIS DEATH SENTENCE.

The Petitioner next alleges that he was denied an adequate appellate review of this death sentence required by law. Specifically, he alleges that the Georgia Supreme Court did not comply with the requirement set forth under Ga. Code Ann. § 27-2537, now codified as O.C.G.A. § 17-1035, which charges that Court with reviewing any sentence of death. The Petitioner alleges that the Georgia Supreme Court's review was a limited one, which allegedly failed to consider the mitigating circumstance of Petitioner's mental retardation.

The Respondent respectfully submits that Ga. Code Ann. § 27-2537; O.C.G.A. § 17-1035 was complied with in this case. In its opinion, the Georgia Supreme Court reviewed the death sentence in this case, considering the aggravating circumstance found by the jury and the evidence concerning the crime and the defendant. This case was tried under the Unified Appeal Procedure and the Georgia Supreme Court reviewed independently the record and the transcript and found no significant error other than those enumerated by the Petitioner. The Georgia Supreme Court, after reivewing the record, found that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and that evidence supporting the aggravating circumstance found by the

APPENDIX E

IN THE SUPREME COURT OF GEORGIA

No. _____

WILLIAM ALVIN SMITH,

Applicant,

v.

ROBERT O. FRANCIS,
Warden, Georgia Diagnostic
and Classification Center,

Respondent.

APPLICATION FOR CERTIFICATE OF
PROBABLE CAUSE

Stephen B. Bright
600 Healey Building
57 Forsyth Street, N.W.
Atlanta, Georgia 30303

Stephen H. Glickman
ZUCKERMAN, SPAEDER, MOORE,
TAYLOR & KOLKER
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Applicant

B. Infliction of the Death Penalty on Petitioner Constitutes Cruel and Unusual Punishment.

The infliction of the death penalty on a retarded human being such as petitioner takes this case out of the mine run of capital cases. It forces this Court to confront whether the Constitution tolerates imposing the most merciless and irrevocable of punishments on that well-recognized class of people who, from inherent mental defect and not any moral fault, are least able to understand and obey society's strictures. Specifically, the question is whether the cruel and unusual punishment clause of the Eighth Amendment forbids the execution of mentally retarded persons such as petitioner.

The Supreme Court most recently held a death sentence cruel and unusual in Enmund v. Florida, ____ U.S. ____, 102 S.Ct. 3368, 73 L.Ed 2d 1140 (1982). There the Court held that the death penalty could not constitutionally be imposed on one who aided and abetted a robbery during which murder was committed by others but did not himself kill or intend to kill. Enmund's analysis of the cruel and unusual punishment clause in those circumstances establishes the controlling principles here.

To begin with, the issue is not whether death is a disproportionate penalty for murder, but rather whether it is a valid penalty for the particular offender. Enmund v. Florida, 102 S.Ct. at 3377, 73 L.Ed 2d at 1152. "The focus must be on his culpability, ... for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' ... which means that we must

focus on 'relevant facets of the character and record of the individual offender.'" Id. (citations omitted; emphasis in the original).

Death is a disproportionate punishment for the particular offender in question if the legitimate purposes of capital punishment would not be substantially fostered by its infliction on persons like him. Two purposes of the death penalty have been accepted by the Supreme Court: retribution, and deterrence of capital crimes by prospective offenders. Gregg v. Georgia, 428 U.S. at 183. "Unless the death penalty when applied to those in [the defendant's] position measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." Enmund, 102 S.Ct. at 3377, 73 L.Ed.2d at 1152 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

The Court struck down the death penalty in Enmund's case because neither deterrence nor retribution would have been significantly furthered by its infliction. As we shall see, its mode of analysis is highly pertinent to petitioner's case. Regarding deterrence, the Court considered the effect on those similarly situated to Enmund, and declared itself "quite unconvinced" that the possibilty of capital punishment for vicarious felony murder would deter those who do not contemplate the killing. Id., 102 S.Ct. at 3377, 73 L.Ed 2d 1152-1153. The Court quoted with approval Justice Frankfurter's observation in Fisher v. United States, 328 U.S. 463, 484 (1946), that "capital punishment

can serve as a deterrent only when murder is the result of premeditation and deliberation." Id.

The Court also dismissed the notion that retribution could justify the execution of Enmund. Retribution, the Court held, must be tailored to the defendant's "personal responsibility and moral guilt." Id., 102 S.Ct. at 3378, 73 L.Ed.2d at 1154. The defendant's mental state is critical to this assessment. Id. Absent the intention to kill, the defendant's culpability would not be so great that his execution would "measurably contribute to the retributive end of insuring that the criminal gets his just desserts." Id. The Court observed that it had "employed a similar approach in Godfrey v. Georgia, 446 U.S. 420, 433 (1980), reversing a death sentence based on the existence of an aggravating circumstance because the defendant's crime did not reflect 'a consciousness materially more "depraved" than that of any person guilty of murder.'" Id.

The application of the foregoing principles to petitioner's situation requires first that his relevant personal characteristics be identified and described. As in Enmund, the focus must be on petitioner's mental condition and its relation to his offense. Then it is necessary to weigh the efficacy of capital punishment for people like petitioner in achieving the goals of retribution and deterrence.

As has been said, petitioner's outstanding characteristic is his unquestioned mental retardation. At his

trial, Dr. Everett Clark Kuglar, Superintendent of the Georgia Regional Hospital, testified that petitioner's full-scale I.Q. was 65, and that his abilities were roughly those of "a youngster in the 10 to 11 year age range." (Tr. at 280-281.) Mr. Merrill L. Gay, former assistant principal of petitioner's middle school, testified that petitioner had been placed in the educable mentally retarded class on the basis of his I.Q. score. (Tr. at 273.) Regrettably, however, the significance of this evidence of petitioner's mental handicap was never developed at his trial. In particular, the behavioral consequences of his impairment were scarcely addressed. Instead the jury may wrongly have been led to believe that petitioner was nothing more than a slow learner. (Tr. at 275.) As discussed earlier in this memorandum, this failure to do more than barely scratch the surface was attributable to petitioner's trial counsel's lack of preparation.

The affidavits admitted in evidence at petitioner's habeas hearing begin to make up for the evidentiary void in the trial record. The affidavit of Dr. Brad Fisher, an experienced and respected clinical-correctional psychologist, provides a comprehensive picture of petitioner. Dr. Fisher's evaluation is based on his own interviewing and testing of petitioner, described in detail at pages 4-6 and 8-12 of his affidavit; his interviews with petitioner's parents and siblings; his review of the testimony at petitioner's trial, including the testimony of Dr. Kuglar and Mr. Gay; and his study of previous test data on petitioner from his school records. (See the affidavit of Lindsey

Shiver, psychometrist for the Oglethorpe County school system, and records accompanying that affidavit.) Dr. Fisher's affidavit is supplemented and corroborated by the affidavits of numerous relatives, friends and acquaintances of petitioner.

The uncontradicted portrait of petitioner which emerges when all the evidence is considered is of a mentally impaired young man whose retardation has had profound behavioral consequences. Any notion that petitioner is merely a "slow learner" is just wrong.

To begin with, the evidence certainly confirms Dr. Kuglar's testimony that petitioner has a mental age of between ten and eleven years. It is clear that petitioner has been recognizably retarded from an early age. With a full scale I.Q. of 65, he falls within the bottom 2.2% of the population. Fisher Affidavit at page 17. It did not require sophisticated testing, however, to discern petitioner's mental limitations. The affidavits of lay witnesses who knew him as relative or acquaintance attest to this. In them petitioner is variously described as being slow, limited and childlike, as in the following illustrative excerpts:

> William was slow, and if you were around the family for a long time you would pick up on the fact that he was not like his brothers and sisters. He was not as active as they were and he was very limited in his ability to understand.... Even up until the time of his arrest, William acted more like a little child than a grown up or a young adult. (Affidavit of Furman Sims.)

He was much slower than his brothers and sisters and other children, but he was quiet, never caused any problems and respected older people. Even as he grew older, Noodle still thought pretty much like a child. He was just like a very big kid. (Affidavit of Evelyn Sims.)

William always talked about things in a child-like way.... He never seemed to understand what things were about .... William has a child's mind. When he would come by our place on Sundays, he played and acted like a child. He would play an Elvis Presley record and talk about how he wanted to be like Elvis and how he wanted to be a movie star. He talked the way children talk about what they want to do when they grow up. William never really grew up. (Affidavit of Carolyn Faust.)

Noodle is not bright. Sometimes when you talked to him, it was like he was in another world. He had trouble paying attention.... Even though he had very limited mental abilities, he did the best he could. (Affidavit of Virginia Smith) (no relation).

Although William started school before I did, I caught up with him in school .... William had problems in school because he could not keep up with everyone else.... he could not read except for a little bit, and he could not answer questions and participate in class like other students. (Affidavit of Willie David Smith, brother.)

William was different from all of the other children in our family. He was slow. I think that perhaps someone might at first just think he was quiet, but William could not learn like the rest of us. I would spend a lot of time with him working on homework, but William just did not understand it. He was the slowest one in our home.... [We] had to look out for him and help him with school work because

he was slow.... (Affidavit of Shirley Ann Smith, sister.)

I have seven other children besides William. The other children always talked more and were more active growing up than William. William did not cry much as a baby or when he was spanked, and he never said very much. He had difficulty learning and understanding. He remained quiet and to himself more than most children. He was held back in school and he was larger than the other children. He was placed in some special classes at school, but he still was not able to keep up. William was just not able to learn the way most children can. I have tried to teach him things, and if they are simple enough he can do them, but more complicated things are too much for him. I tried to teach him to wrap meat so he could help me in my work as a meat cutter, but William could never figure out how to do it right. The other children are able to do it without any trouble at all.

Because of William's limitations, he required more supervision than our other children. He did not give us a lot of trouble, but he required a lot of patience and attention. If you told William to do something and showed him how to do it and worked with him, he would do whatever was asked of him. (Affidavit of Willie B. Smith, father.)

William had problems as a child, however, because he was severely limited in his ability to understand, to follow directions and to do things that most children can do. William was never able to learn to do things as soon as his brothers and sisters, and, as they grew older, the other children were able to do things that William was never able to do.

When William was at home, after school or on weekends, I would ask him to help me clean the house. William would try and he could do things like sweep, but he could not do things like make

> the bed. When he got older, about age 16 or 17, my husband, who has been a meat cutter all of his adult life, tried to teach William how to cut meat and wrap it. William was never able to wrap a package of meat. The younger boys would come in and my husband would cut the meat, and show how to wrap it up and then label it so that you would know what cut of meat was inside the wrapping, but William, or "Nocdle" as we all called him, was never even able to wrap the paper around the cuts the right way. Since he was never able to learn to wrap the meat, my husband never attempted to teach him how to cut it....
>
> William was not smart enough to keep up with the other students in school. He was not able to read very well at all, he could not do arithmetic, and could not spell words. He could not say his ABC's, and I still do not know if he is able to say them all the way through. Although William was in the class for educable mentally retarded at school for a while, he was never given any special training to deal with his mental limitations and no preparation for dealing with life as an adult with his limitations. William was frustrated with school because he could not learn and because he was so much bigger than the other students in his class. Finally, when he got old enough, he just gave up on school and stopped going.
>
> William was very quiet and a lot of people did not know how limited he was. But he could not do anything that was complicated or follow directions. He could not get a driver's license. William does not have the good judgment that some of his brothers and sisters have or that other people have. He had to be in special classes at school, because he was not able to keep up with the other students. William has always needed more attention and more guidance than other children I have had. (Affidavit of Mary Smith, mother.)

The other character traits reported in the affidavits indicate some behavioral consequences of petitioner's mental impairment. He is repeatedly described as being extraordinarily quiet and withdrawn, passive and docile,

submissive to authority and happiest doing simple and repetitive tasks, however back-breaking. Another noteworthy refrain in the affidavits is that he always kept his problems and worries bottled up inside himself. (See, e.g., affidavits of Denise Bolton, Marlene Cofer, Willie B. Henson, Mary Smith, Shirley Ann Smith, Willie David Smith and Sara Taylor.)

Dr. Fisher's clinical evaluation elaborates on the functional consequences of petitioner's mental defects. His conclusions, which are fully supported by the lay witness observations, are summarized in his affidavit as follows:

> The presence of this level of mental retardation indicates much more than just slow learning; it indicates impaired social judgment, impaired ability to understand or acknowledge the consequences of behavior, impaired ability to make rational judgments, increased dependency features, susceptibility to confusion and anxiety in stressful situations, tendency toward more impulsive behavior (this often based on the condition in which the retarded person has more frequent frustrations with the many situations that are confusing and complex to him or her, without the ability to appropriately vent that frustration) and some diminished capacity to distinguish between right and wrong. This latter category is different from an inability to distinguish between right and wrong that may be the case where the insanity issue is involved.)

(Fisher Affidavit, page 11; see also pages 8, 13-14, 16.)

Dr. Fisher's description of petitioner satisfies the statutory definition of a mentally retarded person as "a person having a significantly sub-average general intellectual functioning existing concurrently with deficits in

adaptive behavior which originates in the developmental period." Off. Code of Ga. Ann. §37-4-1(r); see also §17-7-131, defining "mentally ill" in almost identical language.

Dr. Fisher also explains how the foregoing features of petitioner's personality contributed to the commission of the offense. It will be recalled that at his trial there was testimony that in the days immediately before the crime, petitioner appeared unusually despondent and agitated. (Tr. at 350-358.) No explanation for this mental state was offered at trial, however. Dr. Fisher explains that petitioner had just suffered two especially traumatic blows to his self-esteem which were directly related to his impulsive outburst of violence:

> [T]he following features seem especially noteworthy in his description of situational components in the days surrounding the commission of the crime. First, it should be pointed out that one of the most important people in William's life at this time was his girlfriend. He described her as the first person near his own age who had really cared about him, and this had taken on extraordinary importance in his life. With this in mind, the fact that he had broken up with his girlfriend in the two days previous to the crime appears significant. His own description of this event included his feelings of total frustration and confusion over what to do about the breakup.
>
> A second factor revolves around the destruction of William's car the day before the crime. This automobile was his first material possession of consequence, and a major feature relating to his self-esteem and feelings of self-worth. It should be noted that at the time the car was destroyed he did not have a license, and the car was not paid for. This

> served to further heighten his level of frustration and resultant confusion because of his inability to deal with that frustration....
>
> If one was to rank the two most important things in William Smith's life, these would probably have been his girlfriend and his car. To have both of these taken away at the same time would have been traumatic for anyone; however, with his primary psychological dynamics including major limitations in his ability to deal with frustration, as well as easily formed frustration and confusion over typical life experiences not confusing to those not mentally retarded, these events take on special significance. For a person with William's level of retardation, it is important to have a simple, straightforward, and consistent foundation upon which to operate. In his case, the two critical ingredients of this somewhat shaky foundation had been removed, which brought into play the limitations connected with his retardation, much more than would have been the case for a person with normal intellectual functioning, frustration tolerance, and ability to not become confused by outside stimuli.

(Fisher Affidavit, pages 8-10.)

The characterization of petitioner's offense as just another murder with a crass pecuniary motive is thus altogether too simplistic. It is more fairly perceived as the tragically impulsive outburst of a normally docile, mentally handicapped young man in response to a level of inner turmoil, frustration and confusion which was beyond his impaired ability to resolve and control. (Of course, because petitioner's trial counsel neglected to investigate and prepare, he was unable to convey this understanding to the jury.)

Applying now the Supreme Court's analysis of the cruel and unusual punishment clause in Enmund, application of the death penalty to retardates like petitioner measurably serves neither deterrence nor retribution. As far as deterrence is concerned, retardates' behavioral disorders and intellectual deficiencies render them largely immune from the threat of punishment. As petitioner's case illustrates, their impulsivity and intellectual impairment virtually rule out the kind of fully contemplated and coolly calculated crime for which the threat of the death penalty can have a deterrent effect. Enmund, 102 S.Ct. at 3377-3378, 73 L.Ed 2d at 1152-1153.[8/] The retardate's diminished ability to project into the future and rationally contemplate the consequences of his acts further reduces the likelihood that he will appreciate and be restrained by the prospect of punishment, or that he will be influenced by variations in the degree of punishment. See Sternlicht and Deutsch, Personality Development and Social Behavior in the Mentally Retarded 80 (1972); Grigg, Criminal Behavior of Mentally Retarded Adults, 52 Am. J. of Mental Deficiency 370, 371, 374 (1948).

Retribution is an even poorer justification for executing retardates such as petitioner, depending as it does on the degree of their personal culpability. Courts have

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8/ See also Gregg v. Georgia, 428 U.S. at 185-186, distinguishing "murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect," from those who perpetrate "carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act."

long recognized in capital cases that the mentally retarded are not to be held to normal standards of accountability. E.g., State v. Hall, 126 Neb. 295, 310, 125 N.W.2d 918, 927 (1964) (reducing death sentence to life imprisonment where defendant had an I.Q. of 64); State v. Behler, 65 Idaho 464, 475-476, 146 P.2d 338, 343 (1944) (sentence of death reduced to life imprisonment because defendant "possesses a very low order of intelligence"); Commonwealth v. Green, 396 Pa. 137, 148, 151 A.2d 241, 247-248 (1959) (death penalty vacated in light of defendant's youth and dull normal intelligence); see also Woods v. State, 214 Ga. 546, 105 S.E.2d 896, 897 (1958) (jury instructed that weakmindedness, though no defense to the crime, may be grounds for recommendation of mercy). In virtually every state with a capital sentencing scheme, mental retardation is recognized in one way or another to be a mitigating factor in sentencing. The universal recognition that retardates are less culpable than normal people is reflected in Dr. Fisher's actual experience and research, see Fisher Affidavit at 13.

The complex of reasons why retardates are less responsible for their antisocial behavior than ordinary people is summarized in Dr. Fisher's affidavit. Persons with petitioner's degree of mental handicap suffer as a consequence "impaired social judgment, impaired ability to understand or acknowledge the consequences of behavior, impaired ability to make rational judgments, increased dependency features, susceptibility to confusion and anxiety in stressful situations, tendency toward more

impulsive behavior... and some diminished capacity to distinguish between right and wrong." Fisher Affidavit at 11. Dr. Fisher's description is strongly supported in the literature. On the retardate's special proneness to react immediately and violently to the urges of the moment, see, e.g., Bromberg, The Mold of Murder 202 (1961) (tendency of retardates to "react in a blinding flash of vengeance" against frustration and humiliation); Glueck, Mental Disorder and the Law 334-335 (1925) (retardate's defective control of instinctive behavior may lead to serious crimes of violence); Sternlicht and Deutsch, supra at 58 (failure of defense mechanisms of repression and inhibition impair retardates' ability to control aggressive and hostile impulses). As the last-named authors note,

> [The] retarded individual is especially prone to committing deviant acts because he will be subject to weak and ineffective functioning not only in the realm of conscience and values but in the realm of judgment and common sense as well. It is the latter deficit, in fact, which creates perhaps the more immediate and pervasive of the retardate's problems in the area of deviant and antisocial conduct.

Id., at 81. See also Tredgold and Soddy, Textbook of Mental Deficiency (10th ed. 1963) 252 (retardate may evince an understanding of the "nature" of the act -- that it is forbidden -- without fully understanding its "quality").

In short, the infliction of the death penalty on mentally retarded offenders such as petitioner does not serve either of the two recognized purposes of capital punishment. It is therefore "nothing more than the purposeless and needless imposition of pain and suffering,"

Coker v. Georgia, 433 U.S. at 592, which the Eighth and Fourteenth Amendments forbid.

APPENDIX F

IN THE SUPREME COURT OF GEORGIA

No. 41276

WILLIAM ALVIN SMITH,

Appellant,

v.

ROBERT O. FRANCIS,
Warden, Georgia Diagnostic
and Classification Center,

Appellee.

On Appeal From
The Superior Court of Butts County

BRIEF FOR APPELLANT

STEPHEN B. BRIGHT
Suite 500, Healey Building
57 Forsyth Street, N.W.
Atlanta, Georgia 30303
404/688-1202

STEPHEN H. GLICKMAN
Zuckerman, Spaeder, Moore,
Taylor & Kolker
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036
202/775-1440

ATTORNEYS FOR APPELLANT

II. Infliction of the Death Penalty on a Mental Retardate Such as Appellant Violates the Eighth Amendment's Ban on Cruel and Unusual Punishment.

The infliction of the death penalty on a retarded human being such as appellant takes this case out of the mine run of capital cases. It forces this Court to confront for the first time whether the Eighth Amendment tolerates imposing the most merciless and irrevocable of punishments on that small[9/] but well-recognized class of people who, from inherent mental defect and not any moral fault, are least able to understand and obey society's strictures.

The application of capital punishment to retardates like appellant is forbidden if it will not measurably contribute to the goals of retribution or deterrence. Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982). As far as retribution is concerned, the mentally retarded are significantly less morally culpable than ordinary people; but it is precisely upon the existence of reasonable moral responsibility that retribution is founded. Deterrence is also not served, for retardates'

8/ [Footnote continued]...

(i) Keeble handled the direct appeal incompetently, e.g., by neglecting to raise substantial legal issues and by making factual assertions totally unsupported by the record.

9/ Approximately 2.2% of the population suffers from retardation as substantial as appellant's (Fisher Affidavit at page 17).

impairments prevent the threat of capital punishment from influencing their impulsive and ill-reasoned behavior. The infliction of the death penalty on a retarded offender such as appellant is therefore "nothing more than the purposeless and needless imposition of pain and suffering," Coker v. Georgia, 433 U.S. 584, 592 (1977), which the Constitution absolutely forbids.

III. Appellant's Waiver of His Privilege Against Self-Incrimination Was Invalid.

When appellant was arrested, he waived his privilege against self-incrimination and gave a statement that was used against him at trial. The validity of his waiver depends not only on whether it was voluntary, but also on whether it was knowing and intelligent. Edwards v. Arizona, 451 U.S. 477, 482 (1981). The court below erroneously found appellant's waiver valid by completely ignoring the uncontradicted evidence to the contrary. Thus, for example, the court mistakenly said in its order that there was "no evidence other than some testimony concerning his being slightly retarded to show that [appellant] did not understand his rights when read to him." (Order at pages 19-20.) In fact, the evidence was overwhelming that, in light of his mental and educational limitations and the circumstances of his interrogation, appellant's waiver was invalid. See appellant's Application for Certificate of Probable Cause at pages 46-53.

APPENDIX G

IN THE SUPREME COURT OF GEORGIA

WILLIAM ALVIN SMITH,	*	
	*	CASE NO. 41276
Appellant,	*	
	*	ON APPEAL FROM THE
v.	*	SUPERIOR COURT OF
	*	BUTTS COUNTY
ROBERT O. FRANCIS, WARDEN,	*	
	*	HABEAS CORPUS
Appellee.	*	

BRIEF ON BEHALF OF THE APPELLEE BY THE ATTORNEY GENERAL

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

DENNIS R. DUNN
Senior Attorney

Please Serve:

DENNIS R. DUNN
132 State Judicial Bldg.
40 Capital Square, S.W.
Atlanta, Georgia 30334
(404) 656-3499

Enumerations of Error V, VI, VII, VIII, IX, XI, XII and XIV.) As will be shown below, the habeas corpus court correctly determined that none of these allegations were meritorious, and could not serve as the basis for any allegations of ineffective assistance. (See Order, pages 5-17).

Therefore, for all the above and foregoing reasons, Appellant's Enumeration of Error I is without merit.

B. THE APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT.
(Enumeration of Error II).

Appellant contends that, because of his alleged mental defects, the imposition of the death penalty in his case violates the Eighth Amendment. Appellee submits that there is no basis or merit to this allegation.

This Court has found no impediment to the imposition of a death sentence where it is alleged that the accused has a low mental level and social maladjustment, especially when, as in this case, evidence of these issues has been presented to a jury to be considered in mitigation and extenuation. See Corn v. State, 240 Ga. 130, 141, 240 S.E.2d 694 (1977). See also Wallace v. State, 248 Ga. 255, 282 S.E.2d 325 (1981).

Therefore, for all the above and foregoing reasons, Appellee submits that Appellant's Enumeration of Error II is without merit.

C. THE HABEAS CORPUS COURT CORRECTLY DETERMINED THAT PETITIONER'S STATEMENTS WERE FREELY AND VOLUNTARILY GIVEN. (Enumerations of Error III and IV).

Appellant contends that his incriminating statements were involuntary due to his alleged mental retardation and because he was held for an unnecessarily prolonged detention period following his arrest and prior to being presented to a magistrate or appointed counsel. Appellee submits that the habeas corpus court correctly determined that these allegations have no merit.

Initially, Appellee notes that the decision of a trial court regarding the voluntariness of a statement and the admissibility thereof will not be disturbed unless the trial court's decision was clearly erroneous. Cox v. State, 248 Ga. 713, 285 S.E.2d 687 (1982).

The trial court in the Appellant's case, as noted by the habeas corpus court, reviewed the circumstances surrounding the giving of the Appellant's statements, and found the Appellant's statements freely and voluntarily

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CERTIFICATE OF SERVICE

I, STEPHEN H. GLICKMAN, a member of the Bar of this Court, do hereby certify that I have served a copy of Petitioner's Reply to Respondent's Brief in Opposition upon the respondent this 8th day of July, 1985, by mailing a copy with first-class postage prepaid to his counsel of record at the following address:

William B. Hill, Jr., Esquire
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334

Stephen H. Glickman
STEPHEN H. GLICKMAN

EDITOR'S NOTE

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(5)

SUPREME COURT OF THE UNITED STATES

WILLIAM ALVIN SMITH *v.* ROBERT O. FRANCIS, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 84–6780. Decided October 21, 1985

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, dissenting.

Adhering to my views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting from denial of certiorari.

I would vacate the judgment of the Georgia Supreme Court insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). The petitioner has presented an important question concerning the Eighth Amendment's ban on cruel and unusual punishment as applied to the execution of a mentally retarded person.

I

The petitioner is mentally retarded, with an IQ of 65 and mental abilities roughly equivalent to those of a ten-year-old child. He was tried for the murder of one Dan Turner, a friend of the petitioner and his family. There were no eyewitnesses to the crime. The petitioner had gone into Turner's grocery store to buy some cigarettes. The petitioner testified at trial that he grabbed Turner when the latter opened the cash register. Turner reacted by picking up a hammer, and the petitioner then stabbed him and hit him with the hammer after it fell from the victim's hand. Peti-

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tioner took money from the cash register and Turner's wallet and fled.

Petitioner turned himself in to the police and gave a lengthy statement in which he admitted stabbing Turner. When asked about the reasons for his actions, petitioner stated that he had wanted to get money. At trial, however, petitioner stated that he had not entered the store intending to rob Turner, and did not know why he had grabbed Turner as the latter was getting petitioner's cigarettes.

A psychiatrist who examined the petitioner stated that the petitioner showed considerable remorse in discussing the murder. Petitioner testified at trial that he "didn't mean to kill Mr. Dan," but had gotten "carried away" after he saw the victim wielding the hammer in what petitioner interpreted as a threatening manner. There was evidence that the petitioner was under considerable stress in the days preceding the murder. Petitioner's counsel argued that petitioner was insane or, at minimum, lacked the requisite mental intent because of his retardation. Nevertheless, the jury found petitioner guilty of malice murder and armed robbery and sentenced him to death.

II

In *Furman* v. *Georgia*, 408 U. S. 238, 363–369 (1972) (MARSHALL, J., concurring), I concluded that the death penalty was "morally reprehensible" to contemporary society based, in part, on its discriminatory imposition. Statistically, it was "evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society." *Id.*, at 365–366 (footnote omitted). Petitioner suffers the unfortunate distinction of meeting each of these criteria. His case, like so many others coming before this Court, convinces me of the continuing validity of my observations in *Furman*.

I need not recount here our country's shameful history with respect to the mentally retarded. See *City of Cleburne* v. *Cleburne Living Center*, —— U. S. —— (1985) (MAR-

SHALL, J., concurring in the judgment in part and dissenting in part). I believe, however, that the courts bear a special responsibility when faced with the possible execution of a member of a group that has been subject for so long to irrational social stigma.[1] This is particularly true in the instant case, because the petitioner's handicap necessarily diminishes his culpability. A mentally retarded person who is susceptible to confusion and impulsive reaction when put in a stressful situation[2] is the very opposite of the cold-blooded, calculating killers that populate this Court's opinions validating the death penalty. See, *e. g.*, *Gregg* v. *Georgia*, *supra*, at 185–186 (opinion of Stewart, POWELL, and STEVENS, JJ.).

This Court has demanded that a capital sentencing scheme provide, at a minimum, a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not," *Furman*, *supra*, at 313 (WHITE, J., concurring); see *Godfrey* v. *Georgia*, 446 U. S. 420, 427–428 (1980) (plurality opinion). In this case, the mechanical application of the Georgia sentencing scheme undermined one purpose that the Court has determined to underlie such procedures—to reserve the penalty of death for the most culpable killers, thus satisfying society's "instinct for retribution," *Gregg* v.

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[1] It cannot be denied that American communities have traditionally shown a strong desire to be rid of the mentally retarded in any way possible. See *Cleburne*, *supra*, at —— (retarded subjected during end of nineteenth and beginning of twentieth centuries to a "regime of state-mandated segregation and degradation . . . that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow.") See also *Buck* v. *Bell*, 274 U. S. 200, 207 (1927) (upholding compulsory sterilization as alternative to "waiting to execute degenerate offspring for crime"); *Halderman* v. *Pennhurst State School & Hospital*, 446 F. Supp. 1295, 1299–1300 (ED Pa. 1977) (noting history of institutionalization of mentally retarded), aff'd in part and rev'd in part, 612 F. 2d 84 (CA3 1979), rev'd, 451 U. S. 1 (1981).

[2] A psychiatrist who examined the petitioner testified that he exhibits these characteristics. See Affidavit of Dr. Fisher, App. H to Pet. for Cert. The characteristics are typically found in the mentally retarded. See M. Sternlicht & M. Deutsch, Personality Development and Social Behavior in the Mentally Retarded 81–82 (1972).

Georgia, *supra*, at 183 (quoting *Furman*, *supra*, at 308 (Stewart, J., concurring)).[3] The execution of a mentally retarded person serves this retributive function extremely poorly, because the level of "personal responsibility and moral guilt," *Enmund* v. *Florida*, 458 U. S. 782, 801 (1982), is so much lower than in the case of a fully competent person

[3] Courts have often shown reluctance to impute to a retarded defendant the necessary culpability to uphold a sentence of death. See, *e. g.*, *State* v. *Hall*, 176 Neb. 295, 309–310, 125 N. W. 2d 918, 926–927 (1964) (exercising its statutory prerogative to "reduce the sentence rendered . . . when in its opinion the sentence is excessive," court concluded that where the defendant, had an I. Q. of 64, "reduction of the death penalty to one of life imprisonment is warranted"); *State* v. *Behler*, 65 Idaho 464, 474–475, 146 P. 2d 338, 343 (1944) ("Undoubtedly, one possessing a normal mind should be held to a full, strict accountability for his conduct, but, should a person with a pronounced subnormal mind be held to the same high degree of accountability?"); *Commonwealth* v. *Green*, 396 Pa. 137, 151 A. 2d 241 (1959) (vacating death sentence where sentencer had failed to consider mitigating factors, including defendant's youth and subnormal intelligence). See also *Thompson* v. *State*, 456 So. 2d 444, 448 (Fla. 1984) (trial judge erred in overriding jury recommendation of life imprisonment on the grounds that no mitigating circumstances existed, where "appellant's mental retardation could have been considered by the jury as a basis for recommending life imprisonment"). Legislatures have also acknowledged that the retarded are less deserving of the death penalty than other offenders. Many state statutes make mental disease or defect at the time of the criminal act a mitigating factor. See Ark. Stat. Ann. § 41–1304(3) (1977); Cal. Penal Code § 190.3(h) (West Supp. 1985); Conn. Gen. Stat. § 53a–46a(f)(2) (Supp. 1985); Ind. Code § 35–50–2–9(c)(6) (Supp. 1985); Ky. Rev. Stat. § 532.025(2)(b)(7) (1984); La. Code Crim. Proc. Ann., Art. 905.5(e) (West 1984); Md. Ann. Code, Art. 27, § 413(g)(4) (Supp. 1985); Neb. Rev. Stat. § 29–2523(2)(g) (1979); N. J. Stat. Ann. § 2C:11–3(c)(5)(d) (West 1982); Ohio Rev. Code Ann. § 2929.04(B)(3) (1982); Tenn. Code Ann. § 39–2–203(j)(8) (1982); Wash. Rev. Code § 10.95.070(6) (Supp. 1985). See also Ala. Code § 13A–5–51(6) (1982); Ariz. Rev. Stat. Ann. § 13–703(G)(1) (Supp. 1984); Fla. Stat. § 921.141(6)(f) (1985); Miss. Code Ann. § 99–19–101(6)(f) (Supp. 1984); Mo. Rev. Stat. § 565.032(3)(6) (Supp. 1985); Mont. Code Ann. § 46–18–304(4) (1983); N. H. Rev. Stat. Ann. § 630:5(II)(b)(4) (1983); N. M. Stat. Ann. § 31–20A–6(c) (1981); N. C. Gen. Stat. § 15A–2000(f)(6) (1983); 42 Pa. Cons. Stat. § 9711(e)(3) (1982); S. C. Code § 16–3–20(c)(b)(6) (1985); Va. Code § 19.2–264.4(B)(iv) (1983); Wyo Stat. § 6–2–102(j)(vi) (1985).

who commits the same crime.[4] As applied to the petitioner, the death penalty is "nothing more than the purposeless and needless imposition of pain and suffering," *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion), and therefore unconstitutional.

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[4] Recognizing the greatly lower culpability of the mentally defective is certainly not novel; Blackstone notes that "by the law . . . ever since the time of Edward the Third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days as by the strength of the delinquent's understanding and judgment." 4 W. Blackstone, Commentaries *23.